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THE DRAINAGE ACTS, ONTARIO.

AN ANNOTATION OF THE MUNICIPAL DRAINAGE ACT, R.S.O. 1897,
C. 226, AND OF THE DITCHES AND WATERCOURSES ACT, R.S.O.
1897, C. 285, AND AMENDING ACTS, TOGETHER WITH THE
RULES OF PRACTICE BEFORE THE DRAINAGE REFEREES,
AND AN APPENDIX OF STATUTES, CONTAINING THE
LAND DRAINAGE ACT, MANITOBA, AND THE
DRAINING AND DYKING SECTIONS OF THE
MUNICIPAL CLAUSES ACT, BRIT-
ISH COLUMBIA.

BY

FRANK B. PROCTOR, LL.B.
OF OSGOODE HALL, BARRISTER-AT-LAW.

"Three lawsuits, whatever else may result from them, will never drain the land." Per Wilson J., in *Dawson v. Murray* (1869), 29 U.C.Q.B. 464.

"Before parting with this case it may not be amiss to suggest to the parties the imagination of the substantial and effective system of drainage which the amount expended in the costs of this action might have procured for them, or the still more handsome structure (a sort of miniature Thames embankment in earth) which the amount which must yet be expended in costs would buy, if the case go on through the several stages of appeal open to it." Per Meredith J., in *Turtle v. Tp. of Euphemia* (1900), 31 O.R. 404.

TORONTO :
ARTHUR POOLE & CO.,
LAW BOOKSELLERS & PUBLISHERS,
1908

KEO 719

A318

P76

REFEREES UNDER THE MUNICIPAL DRAINAGE
ACT, ONTARIO.

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Entered according to Act of the Parliament of Canada, in the
year one thousand nine hundred and eight, by Arthur Poole & Co., at
the Department of Agriculture.

PREFACE.

Few of the public Acts of Ontario have undergone such frequent and extensive alterations as has The Municipal Drainage Act. It may have been a consequence of this constant state of flux, that no one has hitherto had the temerity to attempt to set in order the decisions determined upon a construction of its provisions. Text-writers, like the generality of mankind, presumably do not care to see their particular apple-cart tipped over by the sudden impact of a statutory amendment. However that may be, the work appeared to require doing, and the author has endeavored to do that which admittedly might have been done more satisfactorily by a more experienced hand. The work does not profess to be without errors or omissions, but it is hoped that its merits will be found to outweigh its deficiencies.

Considerable pains have been taken to point out the connection existing between certain decided cases, and the wording of the particular provisions of the Acts which they respectively interpret as it stood when the decision was rendered. The number of decisions which actually conflict with one another is much smaller than appearances would indicate. On the other hand the authority of a number of cases has been impaired or done away with by subsequent amendments to the Act. Thus Section 75 of the Act has now been amended in such manner as to render the much discussed case of *Sutherland-Innes v. Tp. of Romney* (1900), 30 S.C.R. 495, of small value as a precedent. The hope expressed by Chief Justice Strong in *Valad v. Tp. of S. Colchester* (1895), 24 S.C.R. 622, that "some check may be placed by legislation on appeals to the Court in such cases as the present" has been realized by legislation which prevents drainage cases being carried up to that Court altogether.

Judicial comment has occasionally been called forth by the extraordinary mass of printed matter sometimes found within the covers of drainage appeal books. In a case where this abuse was too flagrant to escape judicial notice, (*Tp. of Merrit v. Harp* (1905) 141 Mich. 233), the items complained of stood after taxation as follows :

Printing 1,198 pages of record at 68	
cents per page	\$818 00
Printing 251 pages of brief at 68 cents..	170 68
Copy of record for printer, 3,798 fos. at 5c.	189 68
	<hr/>
	\$1,178 36

The Court, on appeal, dealt with the matter in a whole-hearted way. It was ordered "that the decree will be modified, so that the bill of costs as taxed by the clerk be amended by inserting 50 pages of record in place of 1,198, 30 pages of brief in place of 251, and 250 folios of copy of record in place of 3,798, to be taxed at the prices per page and folio specified."

The Draining and Dyking sections of the Consolidated Municipal Act, British Columbia, are a re-enactment of the Ontario Act, with some alterations. And a considerable number of the sections of the latter Act are also incorporated in The Farm Drainage Act, Manitoba. The text of these Acts is included in the present volume, which it is hoped, will be found of use in cases arising under either of them. The citation of decisions of the Courts of the American States in considering a statute having to do with municipal affairs needs no explanation.

While the Ditches and Watercourses Act has been annotated on several occasions, so much new case law has been since determined, and so many and important alterations made in its provisions, that a book dealing with this subject might well be adjudged incomplete if it did not assemble the decisions determined upon this useful Act.

OTTAWA, MAY, 1908.

F. B. P.

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Part One.

The Municipal Drainage Act

R. S. O. 1897 Ch. 226 and Amending Acts.

INTRODUCTORY.

The Municipal Drainage Act and the earlier acts from which it has evolved have been fruitful sources of litigation. This has been in part the natural result of the conflicting and antagonistic interests from time to time affected by proceedings instituted under the Act, but has also been due in many cases to the fact that the rights and remedies of the parties and municipalities affected have been insufficiently or obscurely covered by its provisions. The late Chief Justice Hagarty, speaking of the difficulties that had arisen in applying the provisions of the Act to the facts presented in the case of *re Townships of Orford & Howard* (1891), 18 A.R. 496 said, at p. 508, adopting the words of the then Master of the Rolls: "I do not wonder at the difficulty that has arisen in this Act. People who draw Acts of Parliament, knowing themselves what the meaning of them is intended to be, are apt to forget that those who have to construe them, do not know what is in the mind of the draftsman."

THE PLAIN WORDS OF THE ACT MUST GOVERN.—In the drainage cases which have come before the various courts of the Province having cognizance of such matters for adjudication, certain rules of construction have been formulated by the Courts, as occasion has required, to assist in a uniform interpretation of the various provisions of the Act. These rules have been for the most part in accordance with or supplementary to the ordinary rules governing the construction of statutes generally. Thus it has been decided that where the wording of the Act is

clear, the sole duty of the Court is to enforce the appropriate provisions of the Act. In *Turtle v. Tp. of Euphemia* (1900), 31 O.R. 404, Meredith J., said, at p. 407: "Now, whatever notions I might have of the necessity for, or wisdom of, that which the Legislature in plain words provides, I must give effect to it. I have no right to adjudicate away any part of an enactment because it might seem to me needless." And again, "It is surely but right to give the persons who made this law credit for both knowing and saying what they meant, and saying no more than they meant."

THE ACT IS TO BE LIBERALLY INTERPRETED.—Within the limits imposed by the preceding rule, it has been frequently decided that the Act should receive a broad and liberal interpretation. The late Mr. Justice Gwynne, a judge whose familiarity with the intricacies of the drainage acts was universally recognized, in delivering judgment in the early case of *re Montgomery & Tp. of Raleigh* (1871), 21 U.C.C.P. 381, at p. 392, laid down this principle, in the following words: "We must certainly construe this Act, which confers so useful and beneficial a jurisdiction upon municipal councils, in a manner *ut res magis valeat quam pereat*." At a more recent date, Mr. Justice Meredith, in considering the effect of analogous provisions of the Municipal Act, expressed himself thus (*re Dundas St. Bridges* [1904], 8 O.L.R. 52 at p. 55); "It is always to be borne in mind that these local improvement clauses are to be considered remedial legislation, and are to receive such large and liberal construction as will best attain the object of the enactment. They are to be worked out by that plain class of laymen, which usually fills municipal office of township, town or village, as well as of city. They are not to be the subject of expert hair splitting, nor to stand or fall upon any very precise literary criticism, nor upon any Judge's or any court's notion of what is fair or unfair, beneficent or the opposite to the taxpayer. The Legislature may be well, and must, well or ill, be trusted to know what is best and to know how to employ the proper language in which to express its will."

FAILURE TO OBSERVE DIRECTORY PROVISIONS NOT TO INVALIDATE PROCEEDINGS.—The Courts, generally speaking, have declined to set aside or declare inoperative a drainage by-law because of mere failure to observe some directory provision of the Act, where the omission has not affected the result and jurisdiction has been properly founded. The late Chief Justice Hagarty speaking of this *ratio decidendi*, in delivering judgment on a motion to quash a local option by-law, (*re Huson & Tp. of S. Norwich* [1892], 19 A.R. 343) said, p. 350 : "The Courts from the earliest date have striven to avoid undue strictness in the insistence of exact performance of statutable formalities, where they could see that the objection did not reach either to a clear omission of some condition precedent required to be performed; where a mistake had been made in perfect good faith and with an honest purpose of obeying the law, although unintentionally deviating from its strict formal observance—where the objection was wholly technical and nothing had occurred to create a suspicion of unfair dealing, and where there was no reason whatever to believe that the result of the whole proceedings had been affected. It has often been remarked that where a rural population is entrusted with limited power to pass local laws, we must not be hypercritical as to exactitude of procedure." A similar expression of opinion by Meredith C.J., will be found in the more recent case of *Maisonneuve v. Tp. of Roxbrough* (1899), 30 O.R. 127, at p. 131.

MUNICIPAL CONTROL OVER DRAINAGE WORKS NOT TO BE LIGHTLY INTERFERED WITH.—By the different Acts from time to time in force authorizing the construction of drainage works, the powers of supervising the inception, construction and operation of such works has been entrusted almost exclusively to the local municipalities affected thereby. In view of this fact the Courts have as a rule declined to interfere with or override the decision of a municipal council which has proceeded with the proposed work under the appropriate Act, unless there has been a clear departure from the provisions of the statute. In

re Stephens & Tp. of Moore (1894), 25 O.R. 600, at p. 605, Chancellor Boyd expressed this rule as follows : " In matters of drainage the policy of the Legislature is to leave the management largely in the hands of the localities, and the Court should be careful to refrain from interference—unless there has been a manifest and indisputable excess of jurisdiction, or an undoubted disregard of personal rights."

NATURE OF THE POSITION OCCUPIED BY THE INITIATING MUNICIPALITY.—But while the municipality within which the lands of the petitioning owners are situate is given such extensive powers of supervision and control both during the construction of the drain and afterwards, it would seem to be reasonably clear that the Legislature has vested these powers in the municipality because as a permanent and responsible body it is naturally fitted to perform such duties and to assume and discharge the resulting liabilities, and, speaking generally, not because the benefits accruing from drains authorized by the Act are sufficiently widespread to render their construction a matter of general public welfare. As has been said by Referee Hodgins in *Tp. of Elma v. Tp. of Ellice* (1900) 2 C. & S. 259, at p. 263 : " In working out these drainage schemes the initiatory municipality does not work them out for the benefit of the ratepayers of the whole municipality, but only for the benefit of the coadventuring ratepayers within the limited and described drainage area. When set in motion by the petition of certain ratepayers, the municipality thereby becomes a trustee of the powers of construction and of assessment conferred by the Acts, as well as in the fullest sense the trustee for the municipalities and for the coadventurers for whose benefit the drainage work is undertaken, and in which their money is invested. To the creditors from whom the moneys are borrowed on debentures the constructing municipality becomes their only and primary debtor. As between itself and the drainage coadventurers, and the other municipalities representing their drainage coadventurers it becomes their surety, and they are bound to indemnify and save it harmless from all expenses and lia-

bilities properly incurred in the construction of the drainage work undertaken for their benefit."

The relationship existing between an initiating municipality and the ratepayers interested in and assessed for the construction of a drain has been compared to that which exists between a principal and a surety. (*White v. Tp. of Gosfield* [1882] 2 O.R. 287, at p. 298.)

As the municipality intervenes, therefore, for the purpose of giving effect to the prayer of the petitioners, and to act as a responsible guarantor on their behalf, except so far as it exercises improperly or negligently the statutory powers conferred upon it, it should be, and is, protected by the Act from all damages recovered from it by parties injured by the construction or operation of the drain. (Sec. 95[1] of the Act : *Tp. of Sombra v. Tp. of Chatham* [1891] 18 A.R. 252, at p. 268.)

DETERMINED CASES, ANTERIOR TO 1894, FREQUENTLY OF UNCERTAIN VALUE AS PRECEDENTS.—It need scarcely be added that the plain wording of the Act as it stands at present must control and govern decided cases determined upon a construction of the provisions of earlier Acts of more limited scope or of conflicting provisions. In this connection the following remarks of Mr. Justice Osler of the Court of Appeal, in *re Tps. of Caradoc & Ekfrid* (1897) 24 A.R. 576, at p. 578, are in point. "The changes introduced into the drainage laws by the legislation of 1894 are so numerous and extensive, and the powers thereby conferred upon municipalities so largely increased, that in many respects we can now derive but small assistance from cases hitherto decided, and it is better therefore to take the words of the new Act and try from them to find out the intention of the Legislature."

"A CASE IS ONLY AUTHORITY FOR WHAT IT ACTUALLY DECIDES."—In *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, at p. 522, Burton J.A., took occasion to say : "It is very undesirable to express any opinion in these drainage cases except upon

the matter actually in issue and essential to the decision." This warning against giving too great weight to dicta in decided drainage cases was supplemented more recently by Moir C.J.O. in, *re Tp. of Rochester & Tp. of Mersea* (1901) 2 O.L.R. 435, at p. 440. In this case the learned Chief Justice adopted with approval the following citation from the judgment of Lord Chancellor Halsbury in *Quinn v. Leatham* (1901) 1901 A.C. 495, at p. 506; 17 Times L.R. 749 at p. 751 : "There are two observations of a general character which I wish to make ; and one is to repeat what I have often said before—that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." Upon the latter point reference may be made to the judgment of the Court of Appeal, delivered by Meredith J.A., in *McOuat v. United Counties Stormont, Dundas and Glengarry* (1906) 8 O.W.R. 40 at p. 42,* where a similar observation is made in almost identical language.

*This case was subsequently appealed to the Supreme Court, but a settlement was arrived at between the parties before the hearing was reached.

Chronological Table of Statutes leading up to the Drainage Act (Ontario), 1894, and subsequent amending Acts.

An examination of the statutes enumerated below will shew the origin, amendment, consolidation and recasting of the various enactments with respect to municipal drainage works finally incorporated in The Drainage Act 1894, and the amendments which that Act has undergone by subsequent legislation. In connection with this list reference may be made to the judgment of Gwynne J., in, *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495 at pp. 498 *et seq.*, where the earlier Acts leading up to the Act of 1894 are collected and commented on.

- 1859, Con. Statutes of Upper Canada, Ch. 54 (Municipal Institutions Act) secs. 278 and 279, and sec. 277 *re* obstructions in watercourses.
- 1872, 35 Vic. Ch. 26, An Act to provide for the construction of Drainage Works.
- 1873, 36 Vic. Ch. 39 (Municipal Drainage Aid Act) repealed 35 Vic. Ch. 26, and recast the municipal drainage law.
- 36 Vic. Ch. 48 (Municipal Institutions Act) secs. 447 to 463 inc. repealed 35 Vic. Ch. 26 and incorporated and amended its provisions.
- 1874, 37 Vic. Ch. 20, repealed secs. 1-18 inc. and secs. 27 and 28 of 36 Vic. Ch. 39, and provided that proceedings authorized thereby should thereafter be taken under secs. 447-463 inc. of Mun. Insts. Act 1873.
- 1876, 39 Vic. Ch. 34, secs. 3 to 8 inc. amended the drainage provisions of the Municipal Institutions Act 1873.
- 1877, 40 Vic. Ch. 26 amended The Mun. Insts. Act 1873, and added present sub-section 3 (2).
- 1877, R.S.O. 1877 Ch. 174 (The Municipal Act) secs. 529 to 550 inc.
- 1879, 42 Vic. Ch. 31 (Mun. Amend. Act) sec. 27, repealed sec. 531 of Ch. 174 of R.S.O. 1877, and enacted a new section 531 (present sec. 21) and amended sec. 541 of the same Act.
- 1882, 45 Vic. Ch. 26 (an Act to make further provision for the construction of Drainage Works by municipalities) extended the drainage sections of the Mun. Act, R.S.O. 1877 Ch. 174 to cover additional cases.
- 1883, 46 Vic. Ch. 18 (Con. Mun. Act) secs. 570 to 611 inc.
- 1884, 47 Vic. Ch. 32 (Mun. Am. Act) secs. 18 and 19 amend secs. 584 (2) (sec. 73 in the present Act) and 586 of 46 Vic. Ch. 18.
- 1885, 48 Vic. Ch. 39 (Mun. Am. Act) secs. 25 to 29 inc. incorporate new provisions and amend the drainage sections of the Act of 1882.
- 1886, 49 Vic. Ch. 37 (Mun. Am. Act) secs. 20 to 33 inc.

- 1887, R.S.O. 1887, Ch. 184 (The Municipal Act) secs. 569 to 611 inc.
 1891, 54 Vic. Ch. 51 "Drainage Trials Act 1891."
 1892, 55 Vic. Ch. 42 (Con. Municipal Act 1892) secs. 568a to 611 inc.
 55 Vic. Ch. 57, amending Drainage Trials Act 1891.
 1894, 57 Vic. Ch. 56 (The Drainage Act 1894) was a consolidation of the drainage sections of the Consolidated Municipal Act 1892, and The Drainage Trials Act 1891, and amending Act, with much new matter added. It is substituted for these Acts, (sec. 114) and all Acts inconsistent with its provisions were repealed.
 1895, 58 Vic. Ch. 55 amends the Drainage Act 1894.
 1896, 59 Vic. Ch. 66 amends the Drainage Act 1894.
 1897, 60 Vic. Ch. 14 sec. 77 amends sec. 88 (5) of the Drainage Act 1894.
 1897, R.S.O. 1897, Ch. 226 (The Municipal Drainage Act.)
 1899, 62 Vic. (2) Ch. 28 (The Drainage Amendment Act 1899.)
 1900, 63 Vic. Ch. 38 (The Drainage Amendment Act 1900.)
 1901, 1 Edw. VII. Ch. 30 (Act to amend The Municipal Drainage Act)
 1902, 2 Edw. VII. Ch. 32 (Act to amend The Municipal Drainage Act)
 1903, 3 Edw. VII. Ch. 22 (Act to amend The Municipal Drainage Act)
 1904, 4 Edw. VII. Ch. 10 secs. 50 to 52 inc. (Statute Law Amendment Act)
 1906, 6 Edw. VII. Ch. 37, (Act to amend The Municipal Drainage Act)
 1907, 7 Edw. VII. Ch. 42 (Act to amend The Municipal Drainage Act)
 1908, 8 Edw. VII. Ch. 52 (Act to amend The Municipal Drainage Act)

By section 70 of the present Act provision is made for the maintenance of drains which have been constructed under the provisions of The Ontario Drainage Act and its amending Acts. As these enactments are no longer in force no new work can be undertaken under their provisions. The following table will show the history of this Act.

- 1860, 33 Vic. Ch. 2 (The Ontario Drainage Act)
 1871, 34 Vic. Ch. 22 (Act amending The Ont. Drainage Act.)
 1873, 36 Vic. Ch. 38 (Ontario Drainage Act 1873.)
 1874, 38 Vic. Ch. 25 amends Ont. Dr. Act 1873
 1877, R.S.O. 1877 Ch. 33 (Ontario Drainage Act)
 1881, 44 Vic. Ch. 3 amends R.S.O. 1877 Ch. 33.
 1884, 47 Vic. Ch. 8 amends R.S.O. 1877 Ch. 33.
 1887, R.S.O. 1887 Ch. 36 (Ontario Drainage Act)
 1901, 54 Vic. Ch. 51 (Drainage Trials Act.)
 1897, Not consolidated in R.S.O. 1897, see App. Sch. B. p. 3670.

The Municipal Drainage Act.

R.S.O. 1897, Chapter 226, and Amendments thereto.

SHORT TITLE, s. 1.	REPAIRS AND ALTERATIONS :
INTERPRETATION, s. 2.	Alterations of work without further report, s. 74.
DESCRIPTION OF WORKS WHICH MAY BE CONSTRUCTED, s. 3.	Alterations for which further report necessary, s. 75.
PROCEEDINGS :	Repairing works constructed out of general funds, s. 76, 77.
Petition, s. 4.	Minor repairs, s. 78.
Estimate and assessment by Engineer or Surveyor, ss. 5-10.	PENALTIES FOR INJURING WORKS, s. 79.
Report on covering drains, s. 11.	REMOVAL OF ARTIFICIAL OBSTRUCTIONS IN CONSTRUCTING WORKS, s. 80.
Distinguishing assessments, ss. 12-14.	OPERATING PUMPING WORKS, ss. 81, 82.
Filing report, s. 15.	DEBENTURES FOR MAINTENANCE, s. 83.
Notice to persons assessed, s. 16.	MUNICIPALITIES ADOPTING DRAINS UNDER DITCHES AND WATERCOURSES ACT, s. 84.
Consideration of report by Council, s. 17.	WORK ON RAILWAY LANDS, s. 85.
Withdrawal of petitioners, s. 18.	COST OF DRAINAGE WORK, WHAT TO INCLUDE, s. 86.
By-laws, s. 19-20.	PAYMENT OF ASSESSMENT AS BETWEEN LANDLORD AND TENANT, s. 87.
Publication of by-laws, ss. 21, 22.	DRAINAGE TRIALS :
Motions to quash, limitation of time for, s. 23.	Referee, appointment of, s. 88.
COURT OF REVISION, ss. 24-40.	Powers of Referee, s. 89, 90.
APPEALS, ss. 41-52.	Appeals from Assessment, ss. 91, 92.
DEBENTURES, ss. 53-56.	Claims for damages, ss. 93-94.
ASSESSMENT OF ADJOINING MUNICIPALITIES, ss. 57-60.	Mode of assessing damage payable by municipalities, ss. 95.
SETTLING ASSESSMENTS BETWEEN MUNICIPALITIES, ss. 61-64.	Procedure before Referee, ss. 96-100.
ASSESSMENT FOR BENEFIT OF CUTTING OFF FLOW OF SURFACE WATER, s. 65.	Appeals from Referee, s. 110.
AMENDING BY-LAWS, ss. 66-67.	Rules and Tariff of costs, ss. 111-113.
MAINTENANCE OF DRAINAGE WORKS, ss. 68, 71.	
VARYING ASSESSMENTS FOR MAINTENANCE, ss. 72-73.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

Short Title.

1 This Act may be cited as "*The Municipal Drainage Act*." R.S.O. 1897, c. 226, s. 1.

INTERPRETATION.

Interpretation.

2 Where the words following occur in this Act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears :—

"Construction"

1. "Construction" shall mean the original opening, making, excavating or completing of drainage work;

This and the following interpretative clauses appeared first in The Drainage Act, 1894 (57 Vic. Ch. 56.)

"County Judge."

2. "County Judge," and "Judge" shall mean the senior, junior, or acting Judge of a County Court to whom appeals lie under the provisions of this Act from a court of revision, but shall not include a Deputy Judge;

"Court of Revision"

3. "Court of revision" shall mean a court of revision constituted under the provisions of this Act, for the trial of complaints respecting assessments for drainage work;

The mode of constituting courts of revision and the powers granted them in determining drainage appeals are regulated by sections 24 to 40 inc. of the Act.

"Initiating Municipality"

4. "Initiating Municipality" shall mean the municipality undertaking the construction of any drainage work to which this Act applies;

"Maintenance"

5. "Maintenance" shall mean the preservation and keeping in repair of a drainage work;

As to what constitutes "maintenance" or "repair" as distinguished from enlargement or alteration of an existing drain see cases cited under section 73 below.

"Municipality"

6. "Municipality" shall not include a county municipality;

By defining "municipality" so as to exclude counties, the broader definition given in the Municipal Act (3 Edw. VII. Ch. 19, sec. 2 [10]) which would otherwise apply (see Interpretation Act, R.S.O. 1897 Ch. 1 sec. 10) is excluded. Under the different drainage acts in force prior to 1894 county councils had control over the construction of certain classes of drainage works. By the present Act county councils are excluded from exercising any control over drainage schemes undertaken under its provisions. "Municipality," as defined by this sub-section coincides with "local municipality" as defined by the Municipal Act, i.e. "a city, town, township or incorporated village." (3 Edw. VII. Ch. 19, sec. 2 [9]). In this connection the following clauses of the Interpretation section of that Act are pertinent.

(10) "Municipality" shall mean any locality the inhabitants of which are incorporated or are continued, or become so under this Act.

(14) "Township" shall mean township, union of townships, or united townships as the case may be.

(15) "Village" shall mean an incorporated village, unless otherwise expressed.

7. "Owner" or "actual owner" shall include the executor or administrator of an owner's estate the guardian of an infant owner, any person entitled to sell or convey the land, an agent of an owner under a general power of attorney, or under a power of attorney empowering him to deal with lands, and a municipal corporation as regards highways under their jurisdiction.

The above definition of "owner" is taken from the Drainage Act, 1894, and is, in effect, the same as that given in section 3 of The Ditches and Watercourses Act, R.S.O. 1897, Ch. 285. By section 1 of the Drainage Amendment Act 1899 (62 Vic. [2] Ch. 28) a more inclusive meaning was given the word "owner" when used in the latter Act. Cases decided under the Ditches and Watercourses Act, prior to 1899, upon a construction of the term "owner" are therefore equally applicable to define the meaning of this word as used in The Municipal Drainage Act.

York v. Tp. of Osgoode (1894) 21 A.R. 168, 24 S.C.R. 282, arose under The Ditches and Watercourses Act before that Act contained a clause defining the meaning of the word "owner." The Supreme Court decided that any person holding any real or substantial interest in the land affected was an "owner" within the meaning of the Act, but that it did not follow that a person who was assessed as owner was included unless such person had a beneficial interest in the land; and that a mere tenant at will was not an owner within the meaning of the Act.

The term "owner" came up again for interpretation before the Supreme Court in 1899. In *Tp. of McKillop v. Tp. of Logan* (1899) 25 A.R. 498, 29 S.C.R. 702, the point upon which the case turned was whether a lessee of land, who had an unexercised option to purchase, was an "owner" as defined by The Ditches and Watercourses Act. The Court held, following *York v. Osgoode* *supra* that he was not. Mr. Justice Moss of the Court of Appeal in constru-

ing the wording of the clause defining owner (25 A.R. 498, at p. 514) said: "entitled to sell and convey," I think (these words) were intended to apply to a person having a power under which he might sell and convey, although the estate is not vested in him—a person entitled under a power of sale to convey and pass an estate vested in another." (See also judgment of Strong, C. J. in the same case, 29 S.C.R. 702, at pp. 703, 704.)

It has been held that a person who has deposited a deed in escrow to be delivered on payment of the purchase price is, until delivery, an owner within the meaning of a Drainage Act, and is properly counted as such in initiatory proceedings. (*Hull v. Sangamon River Dr. Dist.* [1906] 219 Ill. 454.) And in the same case the Court held that where a person who had the life estate, and his children who represented 4-6ths of the remainder, signed the petition, the sum of their interests constituted ownership within the meaning of the Act under consideration.

The Court of Appeal held in the recent case of *Tp. of Huron v. Tp. of Brooke* (1901) 1 O.L.R. 433, that for the purpose of ascertaining whether a person is a qualified petitioner or not, the last revised assessment roll is conclusive as to status, and that evidence to show that a person entered on such roll as owner is not in fact an owner is not admissible. But it will be noted that this case proceeds wholly upon the wording of section 3 (1) of the Act, and the rule laid down by it determining the status only of such owners as are also petitioners.

"Referee"

8. "Referee" shall mean the "referee for the purpose of the drainage laws of this Province as hereinafter provided." 6 Edw. VII Ch. 37 sec. 5.

"Reference"

9. "Reference" shall mean a reference or transfer to the said Referee under the provisions of this Act;

"Relief"

10. "Relief" shall mean relieving from liability for causing water to flow upon and injure lands or roads;

"RELIEF." See Section 3 (3) of the Act and cases cited there.

"Sufficient outlet"

11. "Sufficient outlet" shall mean the safe discharge of water at a point where it will do no injury to lands or roads.

As to what constitutes a 'sufficient outlet' in any particular case, Mr. Justice Garrow in delivering the judgment of the Court of Appeal in *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, said, at p. 450: "Of course a running stream with sufficient banks to contain the water would usually be a sufficient outlet. But the question is one of fact. For instance a stream already fully occupied in carrying the water properly belonging to it would not be a proper outlet for foreign water brought to it by a ditch constructed under the Act, if the inevitable result would be to cause the water to overflow upon the lands of the owners down stream."

3 (1). Upon the petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners) as shown by the last revised assessment roll to be the owners of the lands to be benefited in any area as described in such petition within any township, incorporated village, town or city, to the municipal council thereof for the draining of the area described in the petition by means of drainage work, that is to say, the construction of a drain or drains, the deepening, straightening, widening, clearing of obstructions, or otherwise improving of any stream, creek or watercourse, the lowering of the waters of any lake or pond, or by any or all of said means as may be set forth in the petition, the council may procure an engineer or Ontario land surveyor, to make an examination of the area to be drained, the stream, creek or watercourse to be deepened, straightened, widened, cleared of obstructions or otherwise improved, or the lake or pond, the waters of which are to be lowered, according to the prayer of the petition; and to prepare a report, plans, specifications and estimates of the drainage work, and to make an assessment of the lands and roads within said area to be benefited and of any other lands, and roads liable to be assessed as hereinafter provided, stating as nearly as may be, in his opinion, the proportion of the cost of the work to be paid by every road and lot or portion of lot for benefit, and for outlet liability, and relief from injuring liability as hereinafter defined. R.S.O. 1897, c. 226, s. 3 (1); 6 Edw. VII, c. 37, sec. 1.

What work may be undertaken on petition.

Council to order examination and report by engineer.

UPON THE PETITION.— Unless the proceedings looking to the construction of the proposed drainage work are instituted by a properly signed petition they do not come within the provisions of the Act and are open to attack by any interested party. The late Mr. Justice Gwynne in delivering judgment in *Tp. of Chatham v. Tp. of Dover* (1886) 12 S.C.R. 321 at p. 338, laid down this well-established principle thus: "The preliminary essential condition precedent, necessary to give the council jurisdiction to take any action which could have any binding effect whatever upon any persons sought to be made chargeable with any part of the cost of such a work is that a petition should be presented to the council praying for the performance of the proposed work, describing its nature, and signed by a majority of the owners of the property to be benefited by the proposed work, which property should be designated in the by-law." This statement of the law was followed with ap-

proval by the Court of Appeal, in the later case of *re Robertson & Tp. of N. Easthope* (1889), 16 A.R. 214 at p. 216. And in *re Tp. of Anderdon & Tp. of Colchester N.* (1891) 21 O.R. 476, the late Mr. Justice Street treated a drainage by-law as invalid, although it had not been quashed within the time limited by the Act, on the ground that there had been no proper petition for the work in question. The application to council was a written demand which did not specify the property to be benefited, nor the nature or extent of the work to be done, and it was in addition restricted by conditions. On an appeal from his judgment a Divisional Court was evenly divided in opinion. It has been held to be contrary to the spirit of the Act, and therefore open to attack, that two adjoining townships should agree upon a joint drainage scheme, and upon the proportion of its cost to be borne by each, and thereupon instruct an engineer to prepare a report in accordance with their agreement. (*In re Jenkins & Tp. of Enniskillen* [1894] 25 O.R. 390.)

The Act does not authorize a municipality to pass a by-law for the construction of a drain differing in size and cost from the drain petitioned for, as such a by-law is in effect based on no petition. (*McCulloch v. Tp. of Caledonia* [1898] 25 A.R. 417, 425.)

By section 4 of the Act it is enacted that "The petition shall be in the form or to the effect of Schedule A to this Act."

SCHEDULE A.

FORM OF PETITION FOR DRAINAGE WORK.

(Section 4)

The petition of the majority in number of the resident and non-resident persons (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll of the township of _____ in the county of _____ to be the owners of the lands to be benefited within said township, and hereinafter described sheweth as follows:

Your petitioners request that the area of land within the said township and being described as follows: that is to say, lots numbered 1 to 10 inclusive in the first concession; lots lettered A to H inclusive in the first concession; north-west halves of lots numbered 4 to 12 inclusive in the third concession; the side-road between lots numbered 7 and 8 in the first concessions, and the road allowance between concessions 1 and 2 and between 2 and 3 (as the case may be, or describing the area by metes and bounds) may be drained by means of:—

1. A drain or drains.
2. Deepening, straightening, widening, clearing of obstructions or otherwise improving the stream, creek or water-course known as (name or other general designation).
3. Lowering the water of lake _____ or the pond known as (name or other general designation) (or by any or all of said means).

And your petitioners will ever pray:—R.S.O. 1897 c. 226 s. 4.

The majority in number of the resident and non-resident persons
 shown to be the owners.

HISTORICAL.—The classes of owners entitled under the various drainage acts in force prior to 1894 to initiate drainage works by petition have varied from time to time. In 1866 (29 & 30 Vic. Ch. 51, sec. 281) it was necessary that the petition should be signed by

a majority of the resident owners. In 1868-9 it was provided by 12 Vic. Ch. 43 sec. 1. that a majority in number of the resident or other owners would suffice. Neither of these acts referred to the assessment roll as the guide to determine the question of ownership. The law was again altered in 1869, by 33 Vic. Ch. 26 sec. 14. This Act provided that the petitioners must consist of (1) a majority of the resident owners, as shewn by the last revised assessment roll, or (2) a majority of the non-resident owners, or (3) a majority of all the owners. The Consolidated Municipal Act 1873 (36 Vic. Ch. 48) contained in section 447 a re-enactment of the law as it stood in 1869. By 36 Vic. ch. 39 passed in 1873 the right of non-resident owners to petition was taken away and it was declared that the majority should consist of owners, as shown by the last revised assessment roll, to be resident on the property to be benefited. In 1874 it was enacted, by 37 Vic. Ch. 20 sec. 1, that the proceedings for the construction of a drain should be commenced by a petition signed by a majority in number of all the owners, whether resident or non-resident, of the property to be benefited, and no reference was made to entry on the assessment roll. In the revision of 1877 (R.S.O. 1877 Ch. 174 Sec. 529) the wording of the clause was settled (with the exception of the proviso excluding farmers' sons) in effect, in its present shape. Subsequent re-enactments, with slight verbal changes, are 46 Vic. Ch. 18 Sec. 570; R.S.O. 1887 Ch. 184 Sec. 569, and 55 Vic. Ch. 42 Sec. 569. The words "exclusive of farmers' sons not actual owners" were inserted first in the Drainage Act 1894 (57 Vic. Ch. 56 Sec. 3 [1]), for the purpose of counteracting the effect upon The Drainage Act of the Franchise Assessment Act of 1889 (52 Vic. Ch. 40 Sec. 2 sub-sec. 2 [f]). By this Act, a farmer's son, in a case where his father's farm was assessed for a sum sufficient when divided between father and son to give each the required property qualification, was entitled to be entered on the assessment roll as a joint owner with his father. Under the present Assessment Act, however, (4 Edw. VII. Ch. 23, Sec. 23 [2] e) a farmer's son is not entered as joint owner, but by his proper designation.

"The majority in number."

That is to say if the petition is signed by a majority of the landowners to be benefited by the proposed work, it is not necessary that the combined assessments of the properties of the petitioners should amount to any fixed proportion, as e.g. one-half, of the total assessed valuation of all the properties which will be liable to share the cost of the work petitioned for.

"Majority . . . of owners . . . benefited in any area as described in such petition."

The wording of the clause "to be benefited in any area as described in such petition," was altered to its present form in 1906 by 6 Edw. VII. Ch. 37 Sec. 1. Prior to this date the wording of the clause had been "to be benefited in any described area." In a considerable number of cases in which the sufficiency of an initiating petition was called in question, the decision had turned, in large part, upon the meaning to be attached to the words "in any described area," and some divergence of judicial opinion had resulted. The point of difference had been whether the necessary majority of landowners was to be ascertained by reference only to the petition and by totalling the number of landowners enumerated in it whose lands were proposed to be benefited by the drain, or whether

it was essential to give jurisdiction in a case where the engineer had assessed other lands for benefit in addition to those set out in the petition that the petition should be signed by a clear majority of all the owners whose lands would derive benefit. In 1871 the Court of Common Pleas was asked to find (*re Montgomery & Tp. of Raleigh*, 21 U.C.C.P. 381) that the petition initiating a drainage work had not been signed by the required majority of the resident owners of the property assessed for the drain. The judgment of the Court was delivered by the late Mr. Justice Gwynne, who, in answer to this objection said (p. 394); "As to the fourth objection, if it be open to the applicants to urge it upon this motion, the onus of proving it also, in my opinion, lies upon the applicants, and they have failed to do so. Treating the by-law with the schedule thereto annexed, to be a finding by the council, impliedly, that these are the only lands in Raleigh benefited by the work, the petition appears to have been signed by a majority of the resident owners of the property assessed. However, in my opinion, the objection is not open to the applicants upon this application. We are not prepared to say that if a municipal council, in violation of the apparent fact that a sufficient number to put the council in motion had not petitioned. . . . should nevertheless proceed to pass a by-law imposing rates, that such a by-law could be sustained upon motion, showing these facts, made to quash it; but in the absence of all suggestion of fraud, and of all opposition to the by-law when before the council upon the ground taken, I think that a by-law which recites that a sufficient number had petitioned should be taken to be true, unless at least the recital be clearly established to be glaringly untrue, so as to afford a presumption of fraud in the proceedings of the council." It would seem to be clear from the foregoing citation that *re Montgomery & Tp. of Raleigh* did not go much beyond laying down a rule for determining the burden of proof when the sufficiency of a drainage petition is called in question, a burden, which the Court apparently was loath to shift. The learned Judge added, at the place cited: "In some future case it may become necessary to determine what majority is sufficient to procure the action of a council." In 1882 it was held by Cameron J. (*re White & Tp. of Sandwich E.*, 1 O.R. 530) that where additional lands were added by the engineer in his report, it was not necessary that the petition should be signed by a majority of all the owners of the lands assessed therein for benefit, but that the petition was sufficient if signed by a majority of the owners of the lands set out in the petition. The same question came before the Court of Appeal in 1889 (*re Robertson & Tp. of N. Easthope*, 16 A.R. 214) when a decision was rendered overruling *re White & Tp. of Sandwich E.* The view of the Court of Appeal was expressed by Chief Justice Hagarty, at p. 217. "I fully agree with the learned judge (i.e. Street J., from whose decision the appeal was taken, reported in 15 O.R. at p. 425) when he says: 'The petition should include a majority of all the persons whom the engineer finds to be benefited by the proposed work, and therefore, if the lands extend so far beyond those mentioned in the petition as to reduce the majority to a minority, the council should not proceed with the matter without obtaining the consent of a majority of the whole.' The Court held that as the by-law in question was based upon a petition which was not signed by a majority of owners benefited, ascertained by reference to the engineer's report, the council had no jurisdiction to undertake the work, and the by-law was accordingly set aside. A similar decision, on this point, had previously been given in 1885, by the Supreme

Court, in a case carried up to that Court (*Tp. of Dover v. Tp. of Chatham*, 12 S.C.R. 321). Drainage Referee Hodgins carried the interpretation of this provision a stage further in the case of *Tp. of Plympton v. Tp. of Sarnia*, 2 C. & S. 223, which came before him in 1897. He held that in order to ascertain whether a majority of owners sufficient to render the petition effective had signed (1) owners whose lands are to be benefited; (2) and owners whose lands are assessed for injuring liability and (3) whose lands are assessed for outlet liability, and lie within the drainage area are to be counted. The term "drainage area" as used in *Tp. of Plympton v. Tp. of Sarnia* must apparently be limited to mean the area described in the petition, as by clause (a) to subsection 3 of section 3 of the Act and by clause (a) to subsection 4 of the same section it is enacted that owners liable to assessment for 'injuring liability' or for 'outlet liability,' as the case may be, shall not "count for or against the petition, unless within the area therein described." And now by the amendment to section 3 (1) by the Act of 1906 the sufficiency of a petition is to be ascertained solely by reference to the area described in it.

The question as to whether a petition had been signed by such a majority of owners as is contemplated by the Act came again before the Court of Appeal in the recent case of *re McKenna & Tp. of Osgoode* (1906) (13 O.L.R. 471). In this case the township engineer had, in his report, enlarged the area to be drained by including many thousand acres of land beyond those set out in the petition. Chief Justice Moss, in whose judgment the majority of the Court concurred, said in this connection, at p. 476: "If there is to be a drainage scheme such as is proposed it surely ought to be initiated at the instance not of a few persons upon whose petition this large scheme has been promulgated, but upon the petition of a fair majority of those who are proposed to be assessed for benefit. They are the persons who will be vitally interested in its performance." *Cassidy v. Tp. of Mountain* (1897) (17 C.L.T. Occ. N. 417) affords another example of the expansive tendencies a drainage scheme sometimes develops when in the hands of the engineer in charge. In this case the petition contained certain unexplained interlineations and alterations. Meredith J. held that the by-law was bad, saying: "A by-law incurring so large an expenditure and imposing 6-7ths of the burden of it on lands and roads the owners of which did not petition for the work, and many of whom were opposed to its being undertaken, based on such a petition ought to be quashed."

In the case of *Tp. of W. Nissouri v. Tp. of N. Dorchester* (1887) 14 O.R. 294, it was urged before a Divisional Court that as the drain in question ran through portions of two adjoining townships, it was necessary in order to comply with the Act, that a majority of the owners to be benefited in each township must petition for the work. The Court decided against this contention. Non-residents who have not had their names inserted on the assessment roll, under the provisions of the Assessment Act (4 Edw. VII. Ch. 23 Sec. 33, Sub-Secs. 5 to 8 inc.) are not qualified petitioners, and are not to be taken into account in ascertaining the requisite majority. (*Tp. of Warwick v. Tp. of Brooke* (1901) 1 O.L.R. 433, at p. 443.)

EFFECT OF AMENDMENT OF 1906 IN IMPAIRING AUTHORITY OF FOREGOING CASES.—The foregoing cases prescribing a mode of ascertaining whether a petition has been signed by the requisite majority of owners must now be read subject to the changes in the wording of this clause introduced by the legislation of 1906. In

addition to the alteration to the wording of this clause by the amending Act of 1906 (6 Edw. VII, Ch. 37 Sec. 1) noted above, it is further provided by section 10 of the same Act that: "No by-law heretofore or hereafter passed by any municipal council under the Municipal Drainage Act shall be deemed invalid or illegal by reason only that the petition for such by-law was not sufficiently signed, if such petition was duly signed by a majority in number of the resident and non-resident persons (exclusive of farmers sons not actual owners) shown by the last revised assessment roll to be the owners of the lands to be benefited in the area described in such petition; provided however, that nothing in this section contained shall effect any litigation now pending with respect to any such by-law, but the same may be proceeded with and adjudicated upon in the same manner as if this section had not been passed." It would appear therefore, that as the law now stands, any petition which is signed by a majority of the qualified owners of the lands to be benefited, within the area described in the petition, if otherwise regular, will be a sufficient basis for subsequent proceedings under the Act, without regard to the extent or number of parcels of land which the engineer may add thereto in his report. The view expressed in *re White & Tp. of Sandwich E.* (1 O.R. 530) has been adopted by the Legislature, and, *re Robertson & Tp. of N. Easthope* (1889) (16 A.R. 214) would seem to be no longer an authority on this point.

WHEN SUFFICIENCY OF PETITION DETERMINABLE.—Whether a petition has been sufficiently signed or not can be ascertained only after the close of the meeting of council called to consider the engineer's report. At this meeting owners who have signed the petition are given an opportunity to withdraw their names, and other parties whose properties will be assessed for the construction of the proposed work and who have not hitherto signed the petition are given an opportunity to do so. (See sec. 17). If after the names of the withdrawing petitioners have been struck out, and the names of other interested parties added, the petition is signed by a sufficient number of owners to make up the requisite majority, the council may then proceed to adopt the report and pass the by-law provisionally. (Sec. 18.)

It has been laid down as a rule by the Court of Appeal in *Gibson v. Tp. of N. Easthope* (1804) 21 A.R. 504, affirmed 24 S.C.R. 707, that where a petition has been originally signed by the required number of owners, some of whom afterwards claim to have withdrawn their names, and others of whom allege a fraud practiced upon them to obtain their signatures, in the absence of the clearest proof in support of such allegations, everything will be presumed in favor of the sufficiency of the petition, and that the presumption will be stronger if time has been allowed to elapse, or the work has been undertaken, without objection having been taken on such grounds, and the money spent in the bona fide belief that the petition was sufficient.

"As shown by the last revised assessment roll."

"Last revised assessment roll" is defined by the Assessment Act 1904 (4 Edw. VII, Ch. 23 sec. 2 [12]) to mean "the last revised assessment roll of a municipality; and an assessment roll shall be understood to be finally revised and corrected when it has been so revised and corrected by the Court of Revision for the municipality,

or by the Judge of the County Court on appeal as by this Act provided, or when the time within such appeal may be made has elapsed."

HOW ASCERTAINED AND EFFECT OF ENTRY ON.—It was decided by the Court of Appeal in 1901 (*Challoner v. Tp. of Lobo*, 32 O.R. 247, 1 O.L.R. 156, affirmed 32 S.C.R. 505) that the term "last revised assessment roll" as used in this section to define the status of petitioners, means the last revised assessment roll which is in existence at the date when the petition is presented to council and acted upon by instructing the engineer to examine and report in accordance therewith, and not some subsequent roll which may by lapse of time have become the last revised assessment roll at the date when the by-law is finally passed. (See judgment of Armour C.J.O., 1 O.L.R. at p. 159.) And in a later case (*Tp. of Warwick v. Tp. of Brooke*, [1901] 1 O.L.R. 433) the same Court held that the last revised assessment roll, ascertained in any particular case by applying the rule laid down in *Challoner v. Tp. of Lobo*, is conclusive evidence as to whether a party entered thereon is in fact an owner or not, and that evidence cannot be admitted to contradict it. The opinion of the Court upon this point finds expression in the judgment of Mr. Justice Osler, at p. 443 of the report, where he says; "The best opinion I have been able to form upon the subject, after a good deal of consideration, is that the assessment roll on which the council is required to act, if they act at all, is conclusive upon the question of the petitioner's status. The petitioners must be persons who are shown by the assessment roll to be the owners of property to be benefited. They are, therefore, persons named in the roll."

"The owners."

Necessarily the parties initiating a drainage work, or such number of them as will make up the required majority of the persons affected by the proposed work must appear, by the last revised assessment roll, to be "owners" within the meaning of the definition given by the Act. Otherwise jurisdiction to proceed with the work will be lacking, and all subsequent proceedings are voidable and may be set aside. (*York v. Tp. of Osgoode* [1894] 24 S.C.R. 282; *Tp. of McKillop v. Tp. of Logan* [1899] 29 S.C.R. 702.)

"To be benefited."

The term "benefit" in this section has received a very broad construction, and has been held, in effect, to include all lands which are subject to assessment under the various provisions of the Act. In other words "benefit" has been construed to include not only the removal of water from the lands of the petitioners and others, but also any provision made by the by-law for removing water from land upon which it has been caused to flow from some higher area by a previously constructed drainage work, and by which such latter area is benefited (*sic.*) in that it is relieved from "injuring liability," and is therefore assessable under this heading; and in like manner to include the user, either directly or indirectly by any higher area of the proposed drain as an outlet for water draining from it, for which user such upper area is liable to assessment under the classification "outlet liability." (Per Gwynne J. in *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495 at pp. 516, 519, cited below; *Tp. of Plympton v. Tp. of Sarnia* [1897] 2 C. & S. 222.)

(As to what constitutes "benefit" within the meaning of the Act see the notes collected below under the phrase "to be benefited.")

WHAT CONSTITUTES A SUFFICIENT DESCRIPTION OF THE LAND TO BE DRAINED.—The area of land which it is proposed to drain must be definitely located and the separate parcels described by reference to their numbers and concessions as shown on the registered plans, or in such a manner as to permit of their identification, as appears clearly from the form of petition given in schedule A. See also *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495, per Gwynne J., at p. 513.

If one familiar with the land and the monuments upon and about it, could, by the courses, distances, monuments and other means of identification given in the petition, apply the description to the lands proposed to be drained with such reasonable certainty as to show the limits of the area, this would appear to be a sufficient description. (*Kohlhepp v. W. Roxbury* [1876] 120 Mass. 596, per Lord J. at p. 599.)

In a case which came before the Court of Appeal in 1885, (*re Tp. of Romney & Tp. of Mersa*, 11 A.R. 712) on it appearing that the petition upon which the by-law was based did not describe the property to be benefited, and had other serious defects, the Court quashed the by-law. Burton J. A., in considering the objection of insufficient description said, (p. 722) "It is impossible to ascertain from the petition itself what lands the council were asked to levy the rate upon."

Where a drainage scheme embraced lands in more than one municipality, Boyd C., spoke of the area as: "Forming a quasi-municipality for the proper drainage of the particular locality." (*Tp. of W. Nissouri v. Tp. of N. Dorchester* (1887) 14 O.R. 294 at p. 299.) A similar definition of a drainage district will be found in *Barton v. Minnie Creek Drainage District* (1903) 112 Ill. App. 640.

"Within any township."

AREA PROPOSED TO BE DRAINED MUST LIE WHOLLY WITHIN INITIATING MUNICIPALITY.—In *Tp. of W. Nissouri v. Tp. of N. Dorchester* (1887) 14 O.R. 294, Chancellor Boyd, delivering the judgment of a Divisional Court, said (at p. 299), that by invoking the assistance of the Interpretation Act, the singular word "township" might be interpreted to include the plural. This section "would then be read in cases where the drainage work extends beyond the limits of one township to provide for a petition by the majority in number of the persons to be benefited in any parts of the two townships." This case turned in large part upon a section of the drainage clauses of the Municipal Act 1883, since repealed, by which the county council was empowered to pass a drainage by-law, in a case where the projected work entered more than one township within the County, and its authority upon this point has probably been weakened by successive legislative changes. A drainage scheme jointly undertaken by two adjoining townships does not appear to come within the intent of the Act as it now stands, nor does it seem that a majority of owners made up by adding together residents of two adjoining townships affected by the proposed drain is such a majority as is contemplated by this section. Such a majority could not well be said to consist only of resident and non-resident owners of the initiating municipality, nor would it seem proper for the council of such municipality to undertake a work based upon a petition signed in part by persons over whom it had no jurisdiction. An initiating municipality can always enter an adjoining township for purposes of outlet (sec. 59) and assess the ratepayers thereof whose lands will receive benefit from the proposed work. The

non-initiating township, on the proper steps being taken, must levy by its own machinery, upon its ratepayers, the amounts assessed against them, and pay the proceeds over to the initiating municipality, or take the course outlined by section 63 to appeal from the engineer's report. In this connection the remarks of Strong C. J. in commenting on *Nissouri v. Dorchester* (*Tr. of Elizabethtown v. Tr. of Augusta* [1901] 32 S.C.R. 295, at p. 301) may be cited. Having referred to the opinion of Chancellor Boyd cited above, the Chief Justice said: "This would have been an improvement upon the actual enactment, but it manifestly was not the intention of the legislature, and so to hold would be making the law and not merely construing the statute as we find it."

See further upon this point sec. 59 below and cases cited there.

"For the draining."

OBJECT OF ACT.—The powers given by the Act are to be exercised to further the object for which such powers are granted, that is to say for the draining or reclamation of wet lands, and not for some other object as to which drainage is a mere incident. Thus in a case (*Scruggs v. Reese* [1891], 128 Ind. 400) arising under a drainage statute of Indiana, which conferred power upon drainage commissioners to alter or change the channels of watercourses as "a method of drainage," it was held, that as the primary object of the Act was the reclamation of wet lands, and the power to alter and straighten watercourses only incidental thereto, a proceeding which was intended primarily to straighten a watercourse, and only incidentally to confer improved drainage facilities, was not within the jurisdiction conferred by the Act; the Court saying "While it is true that the drainage act is to be liberally construed to promote the drainage of wet or overflowed lands, its provisions will not extend to accomplish purposes foreign to the object for which it was enacted."

HELD TO AUTHORIZE CONSTRUCTION OF DRAIN FOR SANITARY PURPOSES.—A majority of the Supreme Court held, in 1895, *Gwynne and Taschereau J.J.* dissenting, (*Lewis v. Alexander*, 24 S.C.R. 551) that in the absence of anything in the petition, plans or by-law in question, going to show that the covered tile drain which had been initiated under the section of the Municipal Act 1883, corresponding with section 3 (1) above, had been built for a more limited purpose, as for surface drainage for agricultural and like objects, the wording of this section, as it then read "for draining of the property," was broad enough to authorize the construction of a drain used to carry off sewage and other offensive matter. Mr. Justice Sedgewick, who delivered the judgment of the majority of the Court, is reported, at p. 554, to have said; "What is the meaning of the words 'for draining of the property?' In my view these words are wide enough to include the draining of property for all purposes, whether these purposes be agricultural or sanitary."

But a license to drain surface water onto the plaintiff's land does not sanction the drain being used for the purpose of conducting offensive matter there. *Gibbins v. Hungerford* (1904) 1 Ir. R. (Ch.) 211.

"By means of drainage work."

HISTORICAL.—For the gradual extension of the classes of work which are now grouped together under the term "drainage work," the corresponding sections of the earlier Acts, should be looked at.

In the Municipal Act, R.S.O. 1877 Ch. 174 sec. 520, the phrase defining the works that might be petitioned for read: "for the deepening of any stream, creek or watercourse, or for draining of the property (describing it)." In 1882, by an amending Act (45 Vic. Ch. 20 sec. 17) the object of the Act was extended to include, "the straightening of any stream or the removal of any obstruction which prevents the free flow of the waters of any stream, or the lowering of the waters of any lake or pond for the purpose of reclaiming flooded land, or more easily draining any lands, and works which it may be expedient to dig, construct or make for the purpose aforesaid or any of them." The amended section reappears in The Municipal Act 1883 (46 Vic. Ch. 18 sec. 570) with slight verbal changes, and the wording of this clause as it appeared in the last mentioned Act, was re-enacted without alteration on the revision of 1887 (R.S.O. 1887 Ch. 184 sec. 569), and again on the consolidation of The Municipal Act in 1892 (55 Vic. Ch. 42 sec. 569). In The Drainage Act 1894 (57 Vic. Ch. 50 sec. 3 (1)) the wording is recast into the form in which it now appears.

These successive alterations would appear to have resulted in narrowing the scope of the Act in certain respects. This will appear if the wording of section 520 of R.S.O. 1877, Ch. 174, and of section 570 of The Municipal Act 1883, are compared with the wording of the present section. By the Act of 1877 a petition might be presented for either of two distinct and alternative purposes (1) for the deepening of any stream, creek or watercourse, or (2) for the draining of the property. And by the Act of 1883, unless the clause for the purpose of reclaiming flooded land or more easily draining any land should be considered as governing all the alternative clauses preceding it, a construction which at least would appear to be doubtful, there were four distinct classes of work that might have been initiated under its provisions, two of them not necessarily affording better drainage facilities. The wording of the present section, on the contrary, clearly indicates that its provisions are to be employed primarily only for the accomplishment of one object, that is to say, the draining of the area described in the petition. The alternative powers granted are simply the defined means by which that one object may be accomplished.

THE MEANING OF THE TERM "DRAINAGE WORK."—The phrase "drainage work" appeared first in The Drainage Act 1894. The case of *Sutherland-Lines v. Tp. of Romney* (1900) 30 S.C.R. 495, turned upon the meaning to be attached to this phrase as used in section 75 of the Act. The Court held that it had no broader meaning than the word "drain" which it replaced. This construction was afterwards adopted by the Court of Appeal, *Armour C.J.O. dissenting, in re Tp. of Rochester & Tp. of Mersea* (1901) 2 O.L.R. 435. As pointed out by Armour C.J.O. this construction must have been arrived at by overlooking section 3 of the Act. By adding sub-section 3 to section 75 in 1906 the Legislature has taken away the authority of these cases upon this point. See notes to section 75 for a further consideration of these cases.

MAY INCLUDE BRANCH DRAINS.—Mr. Justice Lister in delivering the judgment of the Court of Appeal in *re Tp. of Rochester & Tp. of Mersea* (1901) 20 A.R. 474, at p. 480, defined the meaning of this term further by saying: "There can be no doubt that a drainage work may include such branch drains as may be necessary to render the drainage of the area effective, and that the main and branch drains may be regarded as a single scheme or undertaking, for the

expense of which the lands in any way liable to contribute may be assessed as for a single scheme. There is no provision in the statute which suggests in such a scheme, the necessity of a separate assessment."

"*Clearing of obstructions.*"

Mill dams and other artificial obstructions, if situate within the limits of the initiating municipality, may be removed, by agreement with the owner, on compensating him for the loss he sustains. See section 80.

"*Watercourse.*"

Numerous definitions and illustrations of what factors are, and of what are not, essential to the constitution of a legal watercourse are to be found in the reports. In 1864, Vice-Chancellor Spragge was called upon to determine, in *Hill v. Buffalo & Lake Erie Ry.* (10 Gr. Chy. 506, at p. 510), whether a shallow channel worn by water, which escaped from a stream by overflow, at certain periods of the year, was a watercourse. He held that it was not, saying: "It is not the channel through which the waters of the stream are accustomed to flow." In 1888, the case of *Beer v. Stroud* (19 O.R. 1) came up on appeal to a Divisional Court composed of Chancellor Boyd and Robertson J. The case turned upon the question whether a ravine through which rain and surface water had found an outlet for a sufficiently long period to form and maintain a distinct and defined channel was a watercourse entitled to the protection of the law. The Chancellor, in whose judgment Robertson J. concurred, held that it was, saying at p. 18 of the report: "It is not essential that the supply of water should be continuous and from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. Thus a recognized 'course' is obtained, which is originated and ascertained and perpetuated by the action of the water itself. For all practical definition, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel that constitutes a watercourse."

In *Arthur v. Grand Trunk Ry.* (1894) 25 O.R. 37, 22 A.R. 89, damages were sought by the plaintiff, for the cutting off by the defendants' embankment of a ravine or gully, through which water flowed at certain periods of the year. Whether the flow was constant or not, and whether it had any other source than surface water was disputed. On appeal from Falconbridge J., the case came before a Divisional Court composed of Armour C. J. and Street J. Mr. Justice Street expressed his dissent from the definition given by Chancellor Boyd, in *Beer v. Stroud* (Supra) saying: (p. 43) "It is plain, I think, that mere surface water flowing during short intermittent periods as the result of the melting of snow and ice or of a sudden shower or succession of showers, and ceasing to flow at all other times of the year, even though the flow be through a channel cut by the water itself, cannot convert the channel into a watercourse. Without a permanent source which, however, need not necessarily be absolutely never failing, there cannot be a watercourse." On appeal, however, the Court of Appeal (22 A.R. 89) agreed in the opinion expressed by the Chancellor and approved of *Beer v. Stroud*. Mr. Justice MacLennan, in his judgment (p. 94) gave the following careful and exhaustive definition of a watercourse: "If a stream is traced up towards its source a point will always be reached where it ceases to be definable by a bed and

banks; but until that point is reached it must be a watercourse, whether its origin be a spring or several springs, or the rain or snow-fall of a district collected naturally, and flowing away for the first time in a visible course or channel. All our lakes, rivers, and streams have their source in the clouds of the sky precipitated in the form of rain or snow and the sole question in every case is whether the water thus precipitated has formed for itself a visible course or channel and is of sufficient magnitude or volume to be serviceable to the persons through or along whose lands it flows. It is immaterial that it may be intermittent in its flow, or that at certain seasons of the year there may be little or even no flow of water. In this country, streams of considerable magnitude become nearly dry in summer, and yet no one would hesitate to call them water-courses."

In view of the foregoing cases, the following brief definition is suggested. Wherever water has created for itself a defined channel with visible banks or margins (per Armour C.J.O. in *Williams v. Richards* [1893] 23 O.R. 651, at p. 656) within which running water may be found during at least certain seasons of the year, in sufficient volume to be of service to the proprietors of the adjoining lands, a legal watercourse exists, providing always that the flow of water comes from some natural and reasonably constant source, and is not due to some exceptional or unforeseeable event, e.g. a flood. (*Hill v. Buffalo & Lake Huron Ry.* [1864] 10 Gr. Chy. 506, p. 510.)

The fact that a stream, with generally well defined banks, spreads out at certain intermediate points into something like a pond or small lake does not make the whole of it the less a watercourse. (Per MacLennan J.A. in, *re Tp. of Hurwich & Tp. of Raleigh*, [1894] 21 A.R. 677 at p. 687.)

"By any. . . of said means. . . set forth in the petition."

It was said by the late Chief Justice Armour in a case before Court of Appeal (*Challmer v. Tp. of Lobo* (1901) 1 O.L.R. 156), in answer to an objection that the engineer in his report had adopted only some of the means set out in the petition for the drainage of the described area, that it was for the engineer to determine what means should be employed, and that he was under no obligation to employ all the means suggested in the petition.

"May procure."

THE ACT IS PERMISSIVE, NOT IMPERATIVE.—The council is left entirely free to determine whether effect shall be given to the petition or not. The law on this point is very clearly and concisely laid down by Osler J.A. in *Van Egmond v. Town of Seaforth* (1884) 6 O.R. 599, at p. 610, as follows: "Now the powers conferred upon municipal corporations with respect to drainage are discretionary. The Act is permissive not imperative. But to whatever extent they may think proper to exercise them in doing any act which may take away or injuriously affect private rights they must do so by law."

"Procure an engineer, etc."

MODE OF APPOINTMENT.—It has been repeatedly held that an objection that the engineer was not appointed by by-law comes too late if not taken until his work has been ratified by the adoption of his report, and the provisional by-law based upon it has been passed. (*Tps. of Tibury E. and N. v. Tp. of Romney* (1895) 1 C. & S. 261 at

p. 264; *Tp. of S. Dorchester v. Tp. of Malahide* (1895) 1 C. & S. 275; *Tp. of Camden v. Town of Dresden* (1902) 2 C. & S. 308, and s. c. in appeal, 3 O.W.R. 200 (1903)). And in *Dorchester v. Malahide*, *supra*, Drainage Referee Britton is reported (p. 297) to have said: "I am of opinion that the appointment may be by resolution, and that a by-law is not necessary in the first instance to authorize a report." The Act differs in this respect from the Ditches and Watercourses Act, which provides that the engineer appointed to carry out its provisions shall be appointed by by-law.

The effect of appointing a second engineer while the appointment of the first was still in force was considered by Meredith J. in *Turtle v. Tp. of Euphemia* (1900) 31 O.R. 404, a case which arose under the Ditches and Watercourses Act and which turned almost wholly upon the special provisions of that Act in this regard. See notes to sec. 4 of that Act.

"To make an examination."

It is the duty of the engineer to make such an examination of the lands lying within the area to be drained as will enable him to form an intelligent judgment as to the benefits which each parcel will receive from the proposed drainage work when completed. (*Swamp Land Dist. No. 307 v. Gwynn* [1886] 70 Cal. 566 at p. 568.)

THE EXAMINATION MUST BE MADE BY THE ENGINEER IN PERSON.—The late Mr. Justice Street in a case decided by him in 1888 (*re Robertson & Tp. of N. Easthope*, 15 O.R. 423 at p. 431) outlined the duties of an engineer, saying: "The duties imposed upon the engineer are, to a certain extent, judicial in their character, and are such as he alone should perform. He is not, it is true, required to do with his own hand all the work from its inception to its completion, and he is at liberty, if he deem proper to employ assistants; but the work of examining and assessing the several parcels of land affected, for their due proportion of the cost of the drain should be done by himself or under his immediate direction." This passage was at a later date cited with approval by Lister J.A. in *Tp. of Elizabethtown v. Tp. of Augusta* (1901) (2 O.L.R. 4 at p. 17.)

RE-EXAMINATION.—In *Tp. of Elizabethtown v. Tp. of Augusta* (1901), 2 O.L.R. 4; 32 S.C.R. 304, the point at issue was whether an engineer had power to make a valid report upon land which he had previously examined for a practically identical drainage scheme, without a re-examination of the lands assessed. The Court of Appeal were equally divided in opinion. Lister and Osler J.J.A. considered the engineer's report invalid, while Armour C.J.O. and Moss J.A. were of the opposite view. On appeal to the Supreme Court the majority of that Court agreed with Armour C.J.O. and Moss J.A. (32 S.C.R. 295, at p. 304) Mr. Justice Gwynne, who was present on the hearing of the appeal, died before judgment was delivered.

"The stream . . . to be straightened . . ."

An Illinois statute (Hurd's Rev. St. Ill. 1899, p. 557) conferred power upon drainage commissioners to widen, deepen, straighten or enlarge watercourses for purposes of drainage. In executing a drainage scheme initiated under its provisions, it was impracticable because of the circuitous course of the stream, the character of its outlet and the natural obstructions in its channel, to furnish the required protection to the lands by deepening the natural channel. The Commissioners accordingly diverted the stream from its original channel, and caused it to run in a new artificial channel cut

through the appellants' lands and to empty its waters at a new outlet. The appellants had been compensated for the taking of their lands, and the owners of the lands through which the stream formerly ran did not object to the diversion. The new channel shortened the distance, avoided the obstructions, had a better outlet, and by its construction the cost of the work was reduced. Upon these facts the Court held that the Commissioners were authorized by the statute to do as they had done. (*Brier v. Commrs. Job's Creek Drainage District* [1900] 185 Ill. 257.)

See also in this connection *Scruggs v. Reese* (1891) 12 Ind. 400, cited above.

"According to the prayer of the petition."

COUNCIL NOT JUSTIFIED IN ALTERING SCHEME PETITIONED FOR.—The council of the initiating municipality has no authority under the Act to authorize the undertaking of any work other than that petitioned for. If the work petitioned for is impracticable, or too costly they should refuse the petition. (*Miscner v. Tp. of Waukegan* (1882) 46 U.C.Q.B. 457, at p. 405; *Gibson v. Tp. of N. Easthope* (1894) 21 A.R. 504, at p. 505.) Nor has the council power to alter the engineer's report, specifications, and assessments, for the purpose of reducing the size and cost of the work below the size and cost of the work petitioned for. (*McCulloch v. Tp. of Caledonia* [1898] 25 A.R. 417.)

It was held by Mr. Justice Britton, in the recent case of *re McDonald & Village of Alexandria* (1903) 2 O.W.R. 637, that the council without a new petition, was not authorized to adopt an engineer's report, which altered the route of the drain from that set out in the petition. The learned Judge said: "The engineer had no authority to alter the route in the manner he did, substantially making a new work and one not asked for." So long however, as the object sought by the petitioners will be accomplished by the drain as laid out by the engineer, he will be allowed to exercise a reasonable discretion in determining what is the most practicable and least expensive location and course for the proposed drain, and in the absence of clear indication of bias or fraud on his part, his findings on these matters will not be reviewed by a Court. (*Stout v. Chosen Freeholders &c.* of *Hopewell* (1855) 25 N.J.L.R. 202; *Bonfoy v. Gear* (1894) 140 Ind. 292, at p. 296; *Willson v. Talley* (1895) 144 Ind. 74, at p. 80.)

In strict agreement with the above cases holding that an engineer is limited by the scope of the petition, it has been determined by the Court of Appeal in *Tp. of Dover v. Tp. of Chatham* (May 15, 1900, rep. 2 C. & S. 213) that an engineer's report was not invalid, on the ground that he had not exercised his independent judgment, in a case where he did not recommend an additional scheme, which, in his opinion, would render the drain to be repaired more effective than a work of mere reparation, but which, the council, on the ground of expense, were unwilling to undertake.

"To prepare a report, plans . . ."

THE DUTIES OF THE ENGINEER.—The detail of the duties to be performed by the engineer in preparing his report, plans, specifications and estimates of the proposed drain is set out in sections 6 to 10a inclusive of the Act. The engineer's report should be based upon his personal inspection of the area which it is proposed to drain. (*re Robertson & Tp. of N. Easthope* (1883) 15 O.R. 423 at p. 431; *Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4 at p. 17). It should contain sufficient

particulars to outline the nature and extent of the proposed drain. It should show the location, course, capacity, mode of construction and termini of the drain. (Per Cameron C.J. in *Tp. of Dover v. Tp. of Chatham* (1884) 5 O.R. 325, at p. 335; *O'Reilly v. Kankakee Valley Draining Co.* (1869) 32 Ind. 169, at p. 194). It should describe the existing facilities for drainage in the area under consideration, and the advantages that will accrue from the construction of the new drain. The parcels of land to be affected and the names of their owners should be specified, (*re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, per Wilson J. at p. 537) and the nature and amount of the assessment against each parcel shown.

By section 89 (3) of the Act, the referees are given power, with the consent of the engineer, and upon hearing evidence, to amend the engineer's report in such manner as may be deemed just.

It is essential to the validity of any drainage work undertaken under the provisions of the Act that the preliminary investigation and the report should be made by a qualified and sworn engineer, substantially as laid down in the Act. (*Re Jenkins & Tp. of Ennis-killen* (1894) 25 O.R. 399, at p. 406; *McCulloch v. Tp. of Caledonia* [1898], 25 A.R. 417, at pp. 420 and 425.) In a case where this had not been done (*McCulloch v. Tp. of Caledonia* [1898]) 25 A.R. 417) the Court of Appeal held that the drain had not been properly initiated, Burton C.J.O. saying, at p. 420: "It is sufficient to say that the by-law is not founded upon a report, plans, estimates or specifications of an engineer appointed by the council to deal with the works petitioned for, but provides for a drainage work initiated by the council itself, under specifications prepared by itself, and upon property selected by itself instead of by the engineer."

AN ENUMERATION OF THE STEPS TO BE TAKEN BY AN ENGINEER.—The duties to be performed by drainage commissioners in examining and reporting upon a proposed drainage work in Illinois are set out in detail in the Drainage Statutes of that State. (Hurd's Rev. St. 1899, Ch. 42, p. 662.) The portion of this enactment defining their duties is embodied here as a useful epitome of the steps which should be taken by an engineer under the Ontario Act.

"Sec. 9. As soon as may be after their appointment, or within such time as the Court may direct, the commissioners shall examine the land of the petitioners proposed to be drained or protected, and the lands over or upon which the work is proposed to be constructed, and determine:

(1) If drainage and levee work is proposed in the petition, whether the starting point, route and terminus of the proposed work and the proposed location thereof, is or are in all respects proper and feasible, and if not, what is or are so.

(2) The probable cost of the work mentioned in the petition, including all incidental expenses, and the cost of the proceedings therefor.

(3) The probable cost of keeping the same in repair after the work is completed.

(4) What lands will be injured by the proposed work, and the probable aggregate amount of all damages such lands will sustain by reason of the laying out and construction of such work.

(5) What lands will be benefited by the construction of the proposed work, and whether the aggregate amount of benefit will equal or exceed the cost of constructing such work, including all incidental expenses, costs of proceedings and damages.

(6) Whether the proposed district, as set out in the petition filed, will embrace all the lands that may be damaged or benefited by the proposed work, and if not, to report what additional lands will be so affected.

(7) In case the prayer of the petition is for the purpose of repairing and maintaining a levee or levees, ditch or ditches, heretofore constructed under any law of this State, it shall be the duty of the Commissioners to examine the said levee or levees, ditch or ditches and the lands intended to be reclaimed thereby, and to report to the Court: (1) whether, in their opinion, said levee or levees, ditch or ditches, can with proper repairs be made sufficient to protect permanently said lands from overflow from high water, or to drain the same. (2) The probable annual expense of keeping the same in such repair. (3) What lands will be benefited thereby, and the probable aggregate amount of such benefits. (4) Whether the aggregate annual amount of benefits will equal or exceed the annual costs of such repairs, including all incidental expense and costs of proceedings, and (5) Whether the proposed district will embrace all the lands that may be benefited by the maintenance of such levee or ditch, or combined system of drainage, and if not, to report what additional lands will be so affected, giving a description and the names of owners thereof, which report shall be filed with the clerk of the said Court."

"To make an assessment."

ASSESSMENTS TO BE FOUNDED ON INDEPENDENT JUDGMENT OF, AND EXAMINATION BY, ENGINEER.—The object of the Legislature in making this provision is clearly and concisely set out by the late Mr. Justice Street, in his judgment in *re Jenkins & Tp. of Ennis-killen* (1894) 25 O.R. 309, where he said, at p. 406: "The Legislature did not intend that the sums to be assessed against the lands affected by drains constructed under these clauses should be governed by arrangements made between the councils of adjoining townships, but endeavored to secure that they should be fixed in each case by a sworn professional man upon his own skill and judgment."

The nature of the duties to be performed by the engineer is defined in an equally careful manner, by the same judge, in the case last cited (p. 404) in these words: "The engineer acting under these sections is exercising functions of a judicial nature, and is bound to apportion the cost of the work amongst the different parcels of land receiving benefit from it, strictly according to the benefit derived, according to the best of his skill, judgment and ability; each person and municipality charged with a portion of the cost is entitled to the advantage of his unbiased judgment."

It has been said by Moss J.A., in *Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4, at p. 13, whose judgment was on appeal concurred in and affirmed by a majority of the Supreme Court, (32 S.C.R. 304), that in order to make an assessment valid it is not necessary that the engineer should be actually on the ground when he puts down the figures. As the object of an examination is to obtain the requisite information, when he has gained this information, he may proceed at a later date, at any convenient place, to make his computations and apportion the cost of the work amongst the properties assessed according to the proportion of benefit they will derive from the work when completed.

An appeal from the engineer's assessment is to be taken in the manner set out in sections 32 *et seq.* of the Act.

"*Benefit to be proved.*"

BENEFIT MEANS INCREASE IN VALUE.—An outline of the guiding principles to be adopted by the engineer in making his assessments under the Act is laid down by former Drainage Referee Hodgins, in his judgment in the case of *Tp. of Gosfield S. v. Tp. of Gosfield N.* (1897) (1 C. & S. 342, at p. 344) in these words: "It may be proper to note that the general principles of law, which govern the assessment of lands for the construction or repair of drainage works seem to require that some special benefit from such drainage works must accrue to the particular lands proposed to be assessed for the cost of such construction or repair, not some probable general benefit which may be equally applicable to adjoining and non-assessable lands in the locality. Lands which have a natural drainage of their own, which are some distance from, and are neither immediately benefited by, nor artificially connected with the drainage works are not, in the absence of some statutory rule clearly imposing upon him a liability, assessable for the cost of such construction or repair. And in determining whether some special benefit will accrue to a particular lot not artificially connected with the proposed drainage work, it would be proper to consider, primarily, what, if any, enhanced financial value will accrue to it by reason of the proposed drainage work. . . . or what higher price it will command on the market after the drainage work is in full operation. The special benefit or enhanced value should be based upon some actual money value accruing to the lot. Another and a secondary consideration may be the agricultural benefit which will accrue if the owner desires to underdrain his lot, and perhaps also the sanitary benefit which may accrue to the occupiers of the lot by reason of the more rapid removal of the surface waters from the neighboring swampy and unhealthy territory."

Whether an assessment can be properly levied, however, in respect to the matters covered by the last sentence of the above citation from the learned Referee's judgment is open to question. The better opinion would seem to be that an owner should not be assessed for improved facilities for underdraining afforded by the proposed work unless he intends making use of the drain for that purpose. Thus it was said by Cameron C.J. in delivering judgment in a case (*re Hodgson & Tp. of Bosanquet* (1886) 11 O.R. 589, at p. 591) where it was found that the private drains previously constructed by the applicant were sufficient for his purposes, and that his land had not acquired any increased marketable value from the construction of the drain in question, but had on the contrary been seriously diminished in value; "The only benefit the drain is to him, according to the evidence, is to facilitate underdraining, if he chooses to adopt that system of drainage, which he is certainly not bound to do unless he approves of it and thinks fit to adopt it."

INCREASE IN HEALTHFULNESS TOO REMOTE A BENEFIT.—And it would seem to be a better opinion and more in accord with the practical working out of the Act, that the increase in healthfulness which may accrue to a neighborhood by reason of the drainage of adjoining swamps and low lands is too indirect and uncertain a benefit to afford a basis for levying an assessment upon the lands thus rendered more healthy. (*Skinkle v. Tp. of Clinton* [1877] 39 N. J. L. R. 656). Nor would it appear to be a sound principle to assess wet or swampy lands, which in a state of nature, may be productive of sickness to residents of adjoining lands, for the cost of

draining them, unless it should clearly appear that the lands to be drained will be benefited thereby. (*Woodruff v. Fisher* (1853) 17 Barb. N.Y. 224, at p. 231.)

BENEFIT THE SOLE TEST OF ASSESSABILITY.—The construction placed upon the phrase "to be benefited" and its next context, by the late Mr. Justice Gwynne, in his judgment in the case of *Sutherland-Innes v. Tp. of Remney* (1900) (30 S.C.R. 495) is worthy of extended citation, as embodying an authoritative exposition of the law upon this point. The learned Judge said (p. 519): "A careful consideration of the Act condemns, in my judgment, as wholly inadmissible, a construction which should hold that lands not benefited by a drainage work constructed under the provisions of the Act, are nevertheless made liable to assessment for 'injuring liability' or 'outlet liability,' notwithstanding the words in the third section purporting to authorize the engineer 'to make an assessment of the lands and roads within the said area to be benefited and of any other lands and roads liable to assessment as hereinafter provided.' The provisions coming under the terms, as hereinafter provided' seem, I think, to favor, rather the construction that what the legislature intended was, to provide, in the interest of the persons to be assessed, that the sums be assessed upon all lands benefited by the work should show the nature of each item charged separately as follows: (1) for 'benefit,' meaning I apprehend thereby (for no definition is given of this word in the Act) the benefit conferred by the facility for the drainage of all lands within the area of the drainage work, which benefit would vary according to the difference of elevation of the respective lots—the quantity of water to be drained from each—the distance of the several lots from the drainage work—and the like. (2) For 'injuring liability,' i.e. for the special charge to each lot from which water is caused to flow to the injury of other lands, in the manner described in the Act under the definition of 'injuring liability': *the whole of the cost of this work in so far as it relates to the removal of this water is to be borne specially by an assessment upon the lot from which the water causing the injury is so caused to flow.* (3) For 'outlet liability,' which is authorized to be assessed for only in the one particular case of a drain constructed in one township being continued into another until a 'sufficient outlet' for the waters coming down such drain is reached." (For a further consideration of this case see notes to sec. 3 [3] below.)

It is submitted, however, that the definition of the term 'outlet liability' given in the above citation does not correspond with the meaning which the legislature has by the apt words of the Act attached to it. (See sec. 3 (4) below, and cases there cited.)

If the findings of the engineer in any particular case have been determined upon the principles illustrated above they should not be disturbed in the absence of clear evidence of mistake, fraud or bias. As was concisely said by Foster J. in *The People v. Jefferson County Court* (1867) (56 Barb. N.Y. 136, at p. 147.): "The discretion given to the commissioners was no doubt liberal, but it was not an arbitrary one, and it was a discretion in determining what lands were benefited and the extent thereof. It was not intended that they should assess lands which could not be benefited."

ASSESSMENTS FOR CUT-OFF.—It will be noted that in addition to the classes of work specially mentioned in section 3 (1) for the cost of which lands within the drainage area are assessable, provision is made by section 65 of the Act, for levying an assessment upon all lands from which the flow of surface water is cut off by any drainage

work. Such assessment is to be classified as 'benefit.' This section covers cases where lower lands are naturally subject to the flow of surface water from lands of higher level. In such cases the lower lands being by nature servient, in that the surface water drains naturally upon them, and is not conducted there by any drain artificially constructed, are properly chargeable with the cost of intercepting and carrying off such water. But where water has been caused to flow upon lands of a lower level by drains built in relief of lands of a higher level, the higher lands have to bear the cost of removing such water, under the provisions of section 3 (3).

BENEFIT A RELATIVE TERM.—Benefit is in every case a relative term, and the cost of any proposed drainage scheme must always be considered in determining whether the resulting benefit will be sufficiently great to offset the expenditure to be incurred. As was said by Drainage Referee Britton, in *Tp. of Gosfield S. v. Tp. of Mersea* (1895) 1 C. & S. 268, at p. 270.: "Land cannot be benefited more than to convert it from worthless land into land that may be cultivated or used as other tillable land is used; from land of no market value to land of the highest market value of the best land in the locality, land cannot be injured to a greater amount estimated in money, than the entire value of such land, and the 'injuring liability' estimated in the same way cannot exceed that. Whenever a case occurs where the work to benefit petitioners cannot be done except as a cost far in excess of the benefit directly upon, and by furnishing an improved outlet for, any and all lands assessed, such work ought not to be proceeded with merely for the sake of such benefit. And as in this case, the entire assessment against the lands of the petitioners was only \$42, while the other lands in the two townships were charged in all upwards of \$900 for "injuring liability" the proposed drain was held to be outside the intent of the Act. (To the same effect see *Tp. of Raleigh v. Tp. of Harwich* (1897) 1 C. & S. 348 (not overruled on this point on appeal, 26 A.R. 313); *Tritipo v. Beaver* (1900) 155 Ind. 652.)

The power to determine whether, in any particular case, lands will be benefited by the construction of the proposed drain to, or beyond, the extent that they are assessed by the engineer, is committed by section 32 and following sections of the Act to the Court of Revision constituted for such purposes. The Courts have held that the jurisdiction of the Court of Revision to rectify errors and omissions in assessments is exclusive, subject only to appeal to the Judge of the County Court as provided by the Act, and that if an owner wrongly or too highly assessed does not take advantage of his statutory right to appeal to the Court of Revision, he is precluded from afterwards having the by-law declared invalid on this ground. (*Re Montgomery & Tp. of Raleigh* (1871) 21 U.C.C.P. 381, at p. 393; *re White & Tp. of E. Sandwich* (1882) 1 O.R. 530; *re Tp. of Rochester & Tp. of Mersea* (1899) 26 A.R. 474 at p. 481; *Wabash Eastern Ry. v. Lake Fork Drainage District* (1890) 134 Ill. 384.) Such an owner must be presumed to have waived his objections to the assessments. (*Blake v. The People* [1884] 109 Ill. 504.)

BENEFIT MEASURED BY INCREASED OPPORTUNITY FOR DRAINAGE.—It has been held that the proportion of benefit upon which the amount of a drainage tax against a parcel of land is based should be determined by the increased opportunity for drainage that the drain when constructed, will afford the land in question. This may in any particular case be much greater than the immediate

necessity for or use of the drain, as the land may be at the time of the assessing in an uncultivated state, or without the necessary connecting farm drains, or otherwise unprepared to take full advantage of the opportunity for draining afforded by the construction of the drain. (*See Snow v. City of Fitchburgh* (1883) 136 Mass. 183.)

"Or portion of lot."

The assessment should always be sufficiently accurate to enable one to identify the lands assessed, and should be placed against the exact portion of the lot to be benefited in every case where the lot or subdivision is owned by more than one party, and as a rule in a case where the balance of the lot is already sufficiently drained, although in the latter case, if the owner of the part affected is also the owner of the whole lot, or a sub-division thereof, as defined by section 6, the assessment may under the provisions of that section be placed against the whole lot or the sub-division thereof containing the part affected.

The duty of the engineer in this respect is described by Drainage Referee Hodgins in *Tp. of Warwick v. Tp. of Brooke* (1900, 2 C. & S. 243 at p. 246 as follows: "It is the duty of the engineer in assessing the lands liable for the cost of the proposed work to ascertain 'the part of the lot actually affected' and this he can only do by making an examination of each lot (such an examination as an assessor would be bound to make) as will enable him to determine whether the assessment should be placed on the quarter, half or whole lot containing the part affected."

INSUFFICIENT DESCRIPTION OF ASSESSED LANDS.—In a number of cases the Courts have been called upon to determine the sufficiency of the description of the property assessed. Thus in *Robertson v. Tp. of N. Easthope* (1888) (15 O.R. 423), the late Mr. Justice Street said, at p. 430: "It is true that in one or two instances the descriptions are not as full as they should be, thus 'north half 21, 6th concession less two parcels in north-east quarter,' is certainly not a definite description on its face, of the portion assessed; but the property intended is shown upon the engineer's report, and I have never yet seen any assessment roll in which numerous cases of the same nature do not exist, and little, if any, practical inconvenience is found to result." And the same Judge, in the more recent case of *re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 300, said, without deciding whether the misdescription was sufficient grounds for quashing the by-law attacked, (at p. 406): "The north-east part or south-east part or center part of a lot, even with the addition of the acreage is generally, if not always, an ambiguous description." In a later case, however, where many of the parcels assessed were described as a part of a lot, with no other description than "east" or the like and a statement of the number of acres, such descriptions were held by Meredith J. to be uncertain and insufficient, and the by-law based upon such assessments, having other irregularities, was quashed. (*Cassidy & Tp. of Mountain* (1897) 17 C.L.T. Occ. N. 417.) In *Zigler v. Menges* (1886) 121 Ind. 99, the Court held that a statement in a report that six acres of the appellants' land would be benefited, without specifying them, was an insufficient description to authorize an assessment. A description of land, in a drainage assessment, by well understood abbreviations, as, SW $\frac{1}{4}$, NW $\frac{1}{4}$, S. 8, T. 19, R. 5, 40 A. has been held good. (*Elchison Ditching v. Jarrell* (1870) 33 Ind. 131; *Fraser v. The State* (1886) 106 Ind. 471.) And an assessment based upon a misdescription which is patent and not misleading has been held binding on the party assessed. (*Smith v. The State* (1893) 8 Ind. App. 661.)

(2) The provisions of this Act shall apply and extend to every case where the drainage work can only be effectually executed by embanking, pumping or other mechanical operations, but in every such case the municipal council shall not proceed except upon the petition of at least two-thirds of the owners of lands within the area described according to the preceding subsection. R.S.O. 1897, c. 226, s. 3 (2).

When work
requires
pumping
embanking,
etc.

Provision was first made for works of the kind enumerated in this sub-section in 1877 by 40 Vic. Ch. 26 sec. 1.

"*Embanking, pumping or other mechanical operations.*"

NATURE OF WORKS INCLUDED.—This section is apparently intended to govern the construction of that class of protective works which are necessary to prevent water overflowing lands of a lower level, as dykes, embankments and levees, when they are constructed as a part of a drainage work. (*Re Robertson & Tp. of N. Easthope* (1888) 15 O. R. 423, at p. 428; *Sutherland-Innes v. Tp. of Romney* (1900) 26 A. R. 495, at p. 505; 30 S. C. R. 495, at p. 532.) And also to provide for the removal of water from low areas of land, from which owing to the depressed level of the land it cannot be caused to flow away naturally by gravity, and where therefore it is necessary to pump the water to its outlet or over some intervening ridge of land and to install the necessary machinery for that purpose. The erection of embankments or dykes except in so far as they are constructed as incidental to a proposed drainage work for the purpose of rendering it more efficient in operation and maintenance, would not seem to be within the terms of the Act. Such erections in themselves could not be classed as drainage work, under the definition of that phrase given in section 3 (1) of the Act.

INCIDENTAL EMBANKING NOT WITHIN THIS SUB-SECTION.—To bring a proposed drainage work, in carrying out which the construction of embankments is necessary, within the provisions of this sub-section, the embankments must be of such a kind as will, when constructed form independent protective works in themselves. The requirement that the petition should be signed by at least two-thirds of the owners of land within the area described, is apparently not intended to apply to works where a certain amount of embanking is necessary merely for the purpose of confining the water within the drains, in its course to an outlet. Thus it has been said by the late Mr. Justice Street, in *Re Robertson & Tp. of N. Easthope* (1888) (15 O. R. 423) that this sub-section was not intended to apply to a drain, in the construction of which it had been necessary to protect its banks at certain points with timbers to prevent the filling up of the drain by quicksand. His opinion is expressed at p. 428 of the report, as follows:—"I do not understand this sub-section as being intended to apply to every case in which it may become necessary to build or heighten a bank on one or both sides of a drain, or to strengthen it in places by the addition of timber or logs. . . . The words "mechanical operations" in the clause must not be read in their widest sense or every ditch would be within it; they must refer to operations similar to pump-

for the clearing away of water from a low level where embanking is a part of the scheme, and where the operations for keeping the land clear of water are continuous, and extend over future years."

LANDS INCAPABLE OF BEING DRAINED.—In the later case of *Sutherland-Innes v. Tp. of Romney* (1900) (30 S.C.R. 405) the Supreme Court held, reversing the judgment of the Court of Appeal upon this point (26 A. R. 495), that a drainage scheme which consisted in part in the construction of embankments, for the purpose of preventing the waters brought down by two streams overflowing certain low lands, came within the provisions of this sub-section. Mr. Justice Gwynne, who delivered the judgment of the Court, said (p. 532):—"The work so designed at a cost of \$31,000 is nothing but a scheme for reclamation of drowned lands situate in such a low position as to be incapable of being drained. . . . It is perfectly obvious that without the embankments, the purpose for which they were designed, namely, of preventing the waters in the streams expanding over these low lands could not be attained. If the work can be considered a drainage work at all, the embankments are essentially necessary to such work."

It was held by the Court of Appeal in the recent case of *Bradley v. Tp. of Kildigh*, (1905) (10 O. L. R. 201, at p. 204) that by reason of this sub-section, the term drainage work, as used throughout the Act, includes pumping apparatus when installed under its provisions, and its operation, and that as a result, the duty to maintain drainage works imposed upon municipalities by section 68 of the Act included the operation of such machinery.

When lands
ma. be
assessed for
engineering
injury
liability

(3) If from the lands or roads of any municipality, company or individual, water is by any means caused to flow upon and injure the lands or roads of any other municipality, company or individual, the lands and roads from which the water is so caused to flow may, under all the formalities and powers contained herein, except the petition, be assessed and charged for the construction and maintenance of the drainage work required for relieving the injured lands or roads from such water, and to the extent of the cost of the work necessary for their relief as may be determined by the engineer or surveyor, Court of Revision, County Judge, or Referee; and such assessment may be termed "injuring liability;"

(a) The owners of the lands or roads thus made liable for assessment shall neither count for nor against the petition required by sub-section 1 of this section unless within the area therein described. R.S.O. 1897, c. 226, s. 3 (3).

INTRODUCTORY.—An examination of the following statutes will show the origin and growth into their present form of sub-sections (3) & (4), and the cases cited under these sub-sections should be read in connection with the wording of the statutes they respectively interpret. Owing to the frequent and extensive recasting and alterations that these sub-sections have undergone by successive legislative amendments, words and phrases used in the earlier cases have not the same definite meanings attached to them that they have in cases decided after the enactment of the present sub-sections. Before 1894, the terms 'outlet liability' and 'injuring liability' were not employed, nor was the line of demarcation clearly defined between those indicia which would now cause an assessment to fall under the one or the other of these classifications. Thus in the corresponding section of the Act of 1892 (sec. 590 of 55 Vic. Ch. 42) the lands from which water has been caused to flow upon and injure other lands by means of a previously constructed drain are assessable, as for outlet, for their proper share of the cost of the proposed drain, to be built in relief of the flooded lands. Such an assessment is now classified not as outlet but as 'injuring liability'.

The right to assess for outlet was conferred by 36 Vic. Ch. 48 sec. 461. This section reappears in section 544 of the Municipal Act 1877 (R.S.O. 1877 Ch. 174). By the Municipal Amendment Act 1881, (44 Vic., Ch. 24. sec. 22) power to assess under circumstances which would now authorize an assessment for 'injuring liability' was granted. Both provisions were incorporated in a single section, and reappear in sec. 590 of the Municipal Act 1883, (46 Vic., Ch. 18). By 49 Vic., Ch. 37, sec. 30, the wording of the section was amended by adding the words 'except the petition' after the word 'formalities'. The amended section was reenacted in sec. 590 of The Municipal Act 1887. (R.S.O. 1887, Ch. 184), in 52 Vic., Ch. 36, sec. 37, and in 53 Vic., Ch. 50, sec. 37. It was amended and recast in The Municipal Act 1892, (55 Vic., Ch. 42, sec. 590). By the Drainage Act 1894, (57 Vic., Ch. 56, sec. 3 (3) & (4) the former section was divided into two independent sub-sections as they now appear.

The provisions of this sub-section have been frequently before the Courts for construction, and a wide divergence of judicial opinion has been expressed in determining how far, in the cases under consideration, the authority conferred by it to levy an assessment for injuring liability extends.

WHEN ASSESSMENT FOR "INJURING LIABILITY" MAY BE LEVIED.—Assessments for 'injuring liability' are authorized by this sub-section only in cases where water has by any means *been caused* to flow upon and injure other lands. That is to say the owners whose lands are assessed must have actively interfered with the natural course of the water draining from their lands by constructing drains through or by means of which it is carried and deposited upon the injured lands. It is clear that the Act does not confer power to levy an assessment for injuring liability or indeed an assessment of any kind upon lands from which water drains away naturally by gravitation upon other lands. The owners of such lands are not in any way liable for the cost of constructing drains necessary to relieve the lower lands from the water naturally draining upon them. (*Tp. of Stephen v. Tp. of McGillivray* (1891) (18 A. R. 516) as explained by Gwynne J. in *Tp. of Ellice v. Hiles* (1894) (23 S. C. R. 429, at p. 443); *Sutherland-Innes v. Tp. of Romney* (1900) (30 S. C. R. 495, at p. 517); *Tps. of Caradoc & Metcalfe v. Tp. of Ekjrid* (1897) 24 A. R. 576, at p. 580; *Blue v. Wents* (1896) 54 Ohio R. 247; *Beals v. James* (1899) 173 Mass. 591, at p. 600; *Re Tp. of Elma & Tp. of Wallace* (1903) 2 O. W. R. 198, at p. 200.)

The late Mr. Justice Gwynne, in delivering the judgment of the Supreme Court, in *Sutherland-Innes v. Tp. of Romney* (1900) (30 S. C. R. 495) pointed out the line of cleavage which separates an authorized assessment for 'injuring liability' from an unauthorized assessment, saying (p. 517):—"Before any authority is vested in the engineer or land surveyor to make an assessment for 'injuring liability' there must, in each particular case, be a *"corpus delicti"* so to speak, that is to say, there must be apparent water which is caused to flow by an artificial channel from the lands to be assessed upon other lands to their injury, which water is to be carried off by the proposed drainage work"

In *Re Tp. of Harwich & Tp. of Raleigh* (1893) (1 C. & S. 147); (in appeal, 21 A. R. 677) Drainage Referee Britton defined the scope and remedy of this sub-section, saying (p. 151):—"It appears to me that the land owners of Raleigh are in this position, they must suffer the inconvenience of having to take care of any water that in a state of nature will flow from the higher land upon them. They are subject to the burden of this and must themselves bear the expense if they desire to improve their lands by getting rid of this water, but when owners of lands in the higher townships interfere with the water upon their lands and turn it into artificial channels even if in the general direction of the natural flow, when these owners of high lands, by taking advantage of the drainage laws, make drains that will carry more water down than would naturally flow and when they greatly increase the velocity of the water so collected into drains, then the Raleigh landowners have the right to say, for this you are responsible, and the law intends that you shall share to some extent and in some fair proportion the cost of taking this water to a proper outlet, and of preventing its flooding and injuring our lands at all events to a greater extent than it would do if it came in its natural flow."

WHERE WATER FINDS ITS WAY TO A STREAM WITH INSUFFICIENT BANKS.—The Courts have been frequently called upon to determine whether there is power to levy an assessment for 'injuring liability' in a case where water flowing from higher lands finds its way into a watercourse of insufficient capacity, with the result that lands lying at a lower level are flooded and damaged. There has been a uniformity of opinion that under these circumstances the higher lands are not liable. Thus Hagarty C. J. O., in delivering his judgment in *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A. R. 516, at p. 521, said:—"The mere ordinary clearing up of the country, whereby the water ran off through the natural stream more rapidly than when the land was in a state of nature, cannot, I think, be a reason for charging that water is caused to flow upon and injure lands lower down, within the apparent intention of the statute." The action of *Tp. of Stephen v. Tp. of McGillivray* was brought by the lower and initiating township of Stephen to recover from the township of McGillivray the amount assessed against lands in the latter township for injuring liability. The water causing the injury flowed from the lands assessed in McGillivray into a natural watercourse, and was deposited by it upon the flooded lands in Stephen. The Court of Appeal held that the assessments were not justified by the Act, Osler J. A. saying, (p. 525): "Waters so brought down are not, I submit, waters caused to flow upon and injure the lower lands by municipalities, companies or individuals within the meaning of the section." In the case of *Beals v. James* (1899) 173 Mass. 591, Hammond J. delivering the judgment of the full Court said, (p. 600): "The owners of the higher lands were not benefited. The water from their land was taken care of by the law of gravitation, and they needed no help from the town. The simple fact that such water, after going over other land, went finally into the brook, was not a reason for assessing a benefit. Brook or no brook, it flowed from their land, and its subsequent course was of no consequence to them."

WHERE WATER IS CONDUCTED TO A STREAM WITH INSUFFICIENT BANKS.—In 1891 the question arose in *Re Tps. of Orford & Howard* (18 A. R. 496) whether lands in Orford from which water was drained by a drainage work into a stream were liable for the injury caused by the overflow of a stream upon lands in the adjoining and lower township of Howard, and as a result assessable under this sub-section for their proper share of the cost of a drain constructed to relieve them. The Court of Appeal held that they were not, MacLennan J. A. saying (p. 505): "The township of Orford is not causing water to flow upon and injure the lands of Howard, or of any company or individual. They have conducted their surplus water to a natural watercourse: that they had a right to do. If some miles further down the stream, there is an overflow, I do not see how Orford can be said to have caused it. It would be just as correct and as reasonable to say that the inhabitants of Orford cause the floods which annually alarm the citizens of Montreal, because the waters from their township ultimately find their way down the St. Lawrence and help to swell its tide."

The Court of Appeal were again called upon in 1891, in *Tp. of Stephen v. Tp. of McGillivray* (18 A. R. 516), to reaffirm the principle which they had laid down in the case of *Orford v. Howard* (*supra*) although in this case the power of the county council to alone initiate a scheme for the drainage of two adjoining townships was an

additional determining factor. In *Stephen v. McGillivray* suit was brought by the plaintiff township against the defendant township to recover from the latter its assessed proportion of the cost of a drainage work, which by improving the channel of a natural watercourse relieved lands in Stephen from water brought down upon them by the stream in question from the higher lands in McGillivray. Certain landowners in McGillivray used this watercourse as an outlet for their drains and thereby augmented its flow. The Court held that the assessment could not be recovered, Maclellan J.A., saying in his judgment (p. 527): "When this proceeding was initiated McGillivray was using an outlet. . . a natural watercourse. In doing so it was exercising its legal right. If the river sometimes overflowed its banks in Stephen that was no concern of the people of McGillivray, they were not responsible for it, nor would any action lie against them for doing it. It was merely the misfortune of the people of Stephen that their lands along the river lay low."

Some three years later, in the case of *re Tp. of Harwich & Tp. of Raleigh* (1894) (21 A.R. 677) it was urged that the result of the amendments to section 590 as enacted in the Municipal Act 1892 (55 Vic. Ch. 42) was to authorize an assessment for outlet under circumstances similar to those existing in the case of *Tp. of Stephen v. Tp. of McGillivray*. It will be noted that although the assessments in question in this case were termed "for outlet," that this is simply an application of the term given them by the Act. They were in fact such assessments as would now be classed under the term "injuring liability." This appears clearly from the judgment of the Referee, who said: "I have come to the conclusion that section 590 does now authorize an assessment for outlet upon lands that discharge their water through drains, whether these drains are wholly artificial, or have been made in the bed of some natural watercourse, or run, or so-called creek, and where the water coming from these lands to be assessed, flows upon and injures the lower lands, and would continue to do so if an outlet had not been made or improved." On appeal the Court of Appeal divided evenly, Hagarty C.J.O. and Burton J. agreeing with the Referee, while Osler and Maclellan J.J.A. held the contrary opinion, that the amended section did not authorize the levying of an assessment where the work done consisted in enlarging and deepening a natural watercourse. In the result the opinion of the Referee Britton was affirmed.

In 1897 the case of *Broughton v. Tps. of Grey and Elma* (1897) (27 S.C.R. 495) came before the Supreme Court for decision. This was an action by a landowner in the upper township of Elma for a declaration that a by-law of the township of Grey, under which his lands in Elma were assessed for outlet liability was not binding upon him. The drainage work in question consisted in improving a natural stream in the lower township of Grey. The plaintiff's lands were connected with the same stream by a drain discharging into it at a point higher up, in the township of Elma. This case was based upon a construction of section 590 as it stood in the Act of 1892. The judgment of the Court delivered by Gwynne J., was that the provisions of the section did not authorize the assessment, and the opinions of Osler and Maclellan J.J.A. in *Tp. of Harwich & Tp. of Raleigh* (*supra*) were affirmed.

The case of *Tp. of Orford v. Tp. of Howard* (1900) (27 A.R. 223) turned upon a construction of sub-sections 3 and 4 as subdivided and amended by The Drainage Act 1894. The drain under which the assessments were levied was constructed for the purpose

inter alia, of relieving lands in Howard, the lower township, from water caused to flow upon them from lands in Orford by drains discharging into a swale or marsh which extended through parts of each township. The waters discharged by the drains in Orford into the marsh were carried into Howard and there flooded the lands injured. The council of Howard approved of a work which consisted in the improvement of a part of the marsh drain by making it of sufficient capacity to carry off all the water thus conducted to it. Lands in Orford were assessed some \$86 for injuring liability, and the township thereupon appealed from the engineer's report. The Court of Appeal held that the assessments were authorized by the new sub-section. The judgment of the Court was delivered by Lister J.A., who said (p. 230): "A comparison of sub-sections 3 and 4 with section 590 (i.e., of the Con. Mun. Act 1892) makes it perfectly apparent, as it appears to me, that the Legislature in enacting these sub-sections had in view the cases of *re Orford & Howard* (18 A.R. 406) and in *re Harwich & Raleigh* (21 A.R. 677) (the case of *Broughton v. Grey* was then pending) and intended to alter and extend section 590 so as to impose upon lands in a municipality from which water has by any means been caused to flow upon and injure lands in another municipality, a liability to contribute to the cost of a drainage work such as the one in question here, without regard to whether such water has been caused to flow upon and injure such lands either immediately or by means of another drain or by means of a natural watercourse into which it has been conveyed and discharged for the purpose of being carried away. The language of the sub-section is clear and unambiguous. In plain terms it declares that if by any means water is caused to flow upon and injure lands of another municipality, the lands from which water is caused to flow may be assessed, etc. The sub-section obviously refers to waters artificially caused to flow and which would not otherwise find their way to the lower lands." While concurring in the result of this judgment, one member of the Court, Osler J.A., declined to say whether, in his opinion, the new sub-section had the effect of overcoming the case *Broughton v. Grey*. Now while *Orford v. Howard* (1900) expresses the view of the Court of Appeal upon the meaning of the present sub-section 3, the reasons given by Lister J.A., as cited above, for the conclusion arrived at in that case are open to certain observations. In the first place the words by any means, upon which stress is laid, are contained in section 590 of the Act of 1892, and in the section of the same number in Ch. 184, of the revised Statutes of 1887 and must therefore be presumed to have received consideration in the cases determined upon a construction of their provisions. It may be noted further that apart from some purely verbal changes resulting from the subdivision of section 590 of the Act of 1892, no additional phraseology was employed in sub-section 3 of the Act of 1894 to broaden its provisions. But the new clause, which the learned Judge paraphrases, was added to sub-section 4, providing for outlet assessments. This sub-section, by the addition of the words "either directly or through the medium of any other drainage work or of a swale. . . water-course" would appear, clearly enough, to have overcome the cases cited, as far as they deal with the right to assess for outlet. By the same reasoning and because the Legislature did not insert a like clause in sub-section 3, it would seem to have been the intention to confine assessments for injury within the limits set out in *Orford v. Howard* (1891) and *Harwich & Raleigh* (1894.)

It has been held that where an engineer has erroneously assessed for 'outlet liability' instead of for 'injuring liability,' the referee has power under sec. 89 (3) with the consent of the engineer, and upon hearing evidence, to amend his report by placing the assessments under the proper classification. (*Re Tp. of Rochester & Tp. of Mersea* [1899] 26 A.R. 474 at p. 480.)

Taking sub-section 3 as it now stands, and giving full weight to the phrase "by any means," it would appear to authorize an assessment for 'injuring liability,' in cases where the water causing the damage has been carried upon the lands injured, by a farm drain or by a ditch constructed under the Ditches and Watercourses Act.

In the recent case of *re Tp. of Elma & Tp. of Wallace* (1903), 2 O.W.R. 108, the Court of Appeal were again called upon to determine the validity of assessments for outlet and for injuring liability levied by a lower township upon lands in an adjoining higher township, as their share of the cost of a drainage work, which consisted in enlarging a natural watercourse. The lands assessed in Wallace were sufficiently drained by the stream in question, into which the riparian landowners drained their surplus water by surface and underdrains constructed for that purpose. It was held that the assessments were not justified. *Moss C.J.O.*, who delivered the judgment of the Court, saying (p. 200): "The township of Wallace needs no outlet superior to that which nature has provided, and none is supplied by these works. And no artificial works having been introduced, which have had the effect of bringing the flow upon the lands below, the claim for injuring liability cannot be sustained."

"May. . . be assessed and charged for the construction and maintenance."

ASSESSMENTS MUST BE BASED ON BENEFIT.—It has been held by the Supreme Court that no valid assessment of any kind can be levied under the Act unless a coextensive benefit can be shown to accrue to the land assessed. Gwynne J. in delivering the judgment of that Court, in *Broughton v. Tps. of Grey & Elma* (1897) 27 S.C.R. 495, said (p. 503): "The whole scheme of the legislation upon the subject is that they who derive benefit from such a work and they only shall bear the burden of its construction and maintenance." And the same Judge, again speaking for the full Court, said, in *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495, at p. 519: "A careful consideration of the Act condemns, in my judgment, as wholly inadmissible, a construction which should hold that lands not benefited by a drainage work constructed under the provisions of the Act, are nevertheless liable for assessment for 'injuring liability' or 'outlet liability'" These citations are to be read in the light of the very comprehensive meaning attached by Judge Gwynne to the term 'benefit,' in the case last mentioned, when, in dealing with an assessment for 'injuring liability,' he said (p. 516): "Surely there cannot be entertained a doubt that, if water which . . . has been caused to flow from any lands, the property of one person, upon other lands so as to injure such other lands, is so cut off and carried away by any drainage work constructed under sec. 3 as to relieve the injured lands from the injury so caused, and to relieve the owners of the land from which the waters so flowed from liability that constitutes undoubtedly a most material benefit conferred by the said drainage work upon the owner of the land from which the water was so caused to flow for which his land so benefited is justly chargeable in the mode prescribed in the Act in its

definition of 'injuring liability' with an assessment for the benefit so conferred."

The following additional authorities support the general principle that there can be no assessment unless there will be a corresponding benefit. (*Tp. of Orford v. Tp. of Howard* (1891) 18 A.R. 496, per Osler J.A. at p. 499; *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, per MacLennan J.A., at p. 527; *Tp. of Harwich & Tp. of Raleigh* (1894) 21 A.R. 677, per MacLennan J.A. at p. 686; *re Tps. of Caradoc & Metcalfe v. Tp. of Ekfrid* (1897) 24 A.R. 576, per Osler J.A. at p. 581.)

A view of the power to assess conferred by this sub-section which appears to be much more consistent with the meaning ordinarily attached to the word "benefit" than that applied in *Sutherland-Innes v. Tp. of Romney* supra is expressed in the judgment of the Court of Appeal, delivered by Lister J.A., in *Tp. of Orford v. Tp. of Howard* (1900) 27 A.R. 223, where it is said (at p. 230): "And the latter liability (i.e. to be assessed for injuring liability) arises not by reason of any benefit that the upper lands will derive but in respect of the injury sustained by the lower lands resulting from the waters of the upper lands being caused to flow upon and injure the lower lands."

The case of *Sutherland-Innes v. Tp. of Romney* by broadening the term 'benefit' to include within its meaning all valid assessments for outlet or for injuring liability has had the effect of leaving no apt word to define by contrast those advantages accruing directly to lands within the drainage area, hitherto designated as 'benefit' through the construction of a drainage work which carries off the water naturally collecting upon them.

Sub-section 5 of this section lays down the rule by which the engineer is to proceed in assessing for outlet and for injuring liability.

"Injuring liability."

It has been said by Gwynne J., in delivering the judgment of the Supreme Court in *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495 (p. 515): "There is nothing new in the substantial elements of the ideas expressed by the terms 'injuring liability' and 'outlet liability.' These are matters which had always to be taken into consideration as part of the cost of the work to be constructed under all previous municipal by-laws passed for the construction of drainage works."

Definitions of 'injuring liability' based upon the wording of this sub-section are contained in *re Tps. of Caradoc & Metcalfe v. Tp. of Ekfrid* (1897) 24 A.R. 576, per Osler J.A. at p. 580; *Tp. of Warwick v. Tp. of Brooke* (1900) 2 C. & S. 243, per Drainage Referee Hodgins, at p. 244.

(4) The lands and roads of any municipality, When lands may be assessed for "outlet liability."

company or individual using any drainage work as an outlet, or for which when the work is constructed, an improved outlet is thereby provided, either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse, may, under all the formalities and powers contained herein,

except the petition, be assessed and charged for the construction and maintenance of the drainage work so used as an outlet or an improved outlet and to the extent of the cost of the work necessary for any such outlet, as may be determined by the engineer or surveyor, Court of Revision, County Judge or Referee; and such assessment may be termed "outlet liability."

- (a) The owners of the lands and roads thus made liable to assessment shall neither count for nor against the petition required by sub-section 1 of this section, unless within the area therein described. R.S.O. 1897, c. 226, s. 3 (4);

(For an enumeration of the earlier statutes from which the present sub-section has been developed, reference may be had to the notes under sub-section 3 above. And an outline of the earlier cases construing the sections of the Municipal Acts from time to time in force, which, up to 1894, combined such provisions as were made therein for assessing for outlet and for injury, will be found under the same sub-section.)

"Using . . . as an outlet, or for which . . . an improved outlet . . ."

WHEN AN ASSESSMENT FOR OUTLET IS AUTHORIZED.—It will be noted that there are two distinct classes of cases when an assessment for 'outlet liability' is authorized by the provisions of this sub-section: (1) where there is an existing drain at a lower level and the municipality constructing the new drain under the provisions of the Act use the lower drain as an outlet for the waters collected from the upper lands to save the cost of continuing their drain to some natural watercourse or other proper point of discharge (*Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, per Osler J.A. at p. 525.) And the converse of this case, where the proposed drainage work is on a lower level, and is in part or wholly necessitated by water being carried down to its upper terminus or upon the lands which it is proposed to drain, either directly by the upper drain or by means of any artificial or natural channel into which the upper drain discharges. In such case the lands draining into the upper drain are assessable, to the extent that they will be provided with an improved outlet, for their proper share of the cost of the proposed work. (*In re Caradoc & Metcalfe v. Ekfrid* (1897) 24 A.R. 576; *Tp. of Orford v. Tp. of Howard* (1900) 27 A.R. 223; *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495; *re Tp. of Elma & Tp. of Wallace* (1903) 2 O.W.R. 198.)

"Either directly or through the medium of any other drainage work . . ."

The words "or of a swale, ravine, creek or watercourse" were inserted on the consolidation and reenactment of the drainage sections in The Drainage Act 1894. As was said by Osler J.A. in *re Tps. of Caradoc & Metcalfe v. Tp. of Ekfrid* (1897) 24 A.R. 576 at p. 578: "The general course of legislation seems to have been in favor of conferring increased powers upon one township, or a lower

township, to affect other townships, and to impose very heavy burdens upon the latter, where their waters, even merely as the result of gravitation pass into drainage works constructed by the former.

EFFECT OF BROADENING OF SECTION UPON EARLIER DECISIONS.

—It was held in a series of cases decided upon the wording of this sub-section as it stood before the above clause was added, that where the water afforded an improved outlet was brought down to the drainage work in question by a stream or watercourse, into which the lands assessed for outlet discharged their waters by a drain emptying into it at some upper point, the assessments for outlet levied upon such lands were not authorized by the Act. (*Re Tps. of Orford & Howard*, 18 A.R. 496; *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, at p. 527; *re Tp. of Harwich & Tp. of Raleigh* (1894) 21 A.R. 677; *Broughton v. Tps. of Grey & Elma* (1897) 27 S.C.R. 495.) In *Tp. of Orford v. Tp. of Howard* (1900) 27 A.R. 223, decided upon the wording of this sub-section as amended by the Act of 1894, Lister J.A., delivering the judgment of a majority of the Court of Appeal, said (p. 231): "Sub-section 4... was obviously intended to overcome, and in my opinion, does overcome the decisions before cited by providing that lands using a drainage work as an outlet, either directly or by means of any other drainage work, or of any swale, ravine, creek, or watercourse, may be assessed as for outlet."

(For a more extended consideration of *Tp. of Orford v. Tp. of Howard* (1900) 27 A.R. 223, and of the earlier cases distinguished by it refer to the notes collected under sub-section 3 above.)

"May... be assessed and charged."

ASSESSMENT MUST BE BASED ON BENEFIT.—In order that higher lands already drained should be subject to contribute, under the heading of outlet assessment, to the cost of a drainage work constructed at a lower level, it is necessary that some benefit shall accrue to them, which benefit may consist in their being furnished with an outlet or an improved outlet for their waters. "No authority is given, as I read the section, said Osler J.A., (*Tp. of Orford v. Tp. of Howard* (1891) 18 A.R. 496 at p. 499) to construct a drain in the first instance for outlet purposes and charge the cost of construction upon a municipality, company or person who may not desire to use it." Where, therefore, the existing outlet is a "sufficient outlet," within the meaning of section 2 (11) of the Act, for the lands assessed for the proposed drain, any assessments placed upon them under the assumed authority of the provisions of this sub-section will be set aside. (*re Tp. of Harwich & Tp. of Raleigh* (1894) 21 A.R. 677 per Maclellan J.A. at p. 686; *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.R.C. 495; *re Tp. of Elma & Tp. of Wallace* (1903) 2 O.W.R. 198; *re Tps. of Caradoc & Metcalfe v. Tp. of Ekfrid* (1897) 24 A.R. 576.)

In *re Tps. of Caradoc & Metcalfe v. Tp. of Ekfrid* (1897) 24 A.R. 576, the Court of Appeal set aside assessments for outlet charged against lands to defray the cost of constructing a new outlet for an existing drain, undertaken under the provisions of section 75 of the Act. Osler J.A. in his judgment, said (p. 581): "What I regard as objectionable in the principle the engineer seems to have adopted is this, that, to use his own language, he has taxed the lands because they contribute water to the area drained, charging lands within that area with outlet expenses, no matter how remote they are,

and although the new work or perhaps the drain itself is not necessary for the cultivation and drainage of the land."

(The cases discussing and defining the term "benefit" as used in the Act will be found collected under section 3 (1) above, and also under sub-section 3 [3] above.)

"To the extent of the cost . . . of such outlet."

A partial basis for determining the amount to be assessed against lands for outlet liability is provided by sub-section 5 of this section.

It has been suggested by Drainage Referee Hodgins (*Tp. of Plympton v. Tp. of Sarnia* (1899) 2 C. & S. 223 at p. 228; and see *Drayton v. Drainage Commissioners* [1889] 128 Ill. 271) that the measure of the assessments upon the lands of upper landowners for outlet should be the cost of enlarging the proposed drain beyond the size that it might otherwise be built, so as to give it sufficient capacity to carry down their waters to a proper outlet. It has been held, however, in *Drainage Commrs. of District No. 2 v. Drainage Commrs. of District No. 3* (1903) (113 Ill. App. 114, aff. 211 Ill. 328), in agreement with the cases determined by the Courts of this Province, cited above, that the amount to be paid by a drainage district when it connects its drains with the drain of another district is determinable alone by the benefits accruing to the lands in the upper connecting district by reason of such connection.

Basis of
assessment
for outlet and
injuring
liability.

(5) The assessment for injuring liability and outlet liability provided for in the two next preceding sub-sections shall be based upon the volume, and shall also have regard to the speed, of the water artificially caused to flow upon the injured lands or into the drainage work from the lands and roads liable for such assessments. R.S.O. 1897, c. 226, s. 3 (5).

"Shall be based upon the volume, and . . . the speed . . ."

In considering the application of this sub-section to the drainage work under consideration, Gwynne, J., speaking for the Supreme Court, said (*Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495 at p. 517): "This provision seems to be calculated, if not intended, to afford some protection to the parties assessed . . . by providing that . . . each assessment must be made upon the circumstances of each particular case upon the basis prescribed in the sub-section 5; and secondly, as supplying some mode, through not a very perfect one, of testing the value of the calculations as made by the engineer." And again, at p. 520: "The just mode of applying that sub-section to 'outlet liability' would seem to be: first, to determine the total amount chargeable for 'outlet liability' by a calculation based upon the volume in which and the speed at which this water comes down the drain to its outlet in another municipality than that in which the drain is initiated; and secondly to apportion that sum among the several lots from which water is caused to flow by artificial means from the lands assessable into the drains upon a calculation based upon the volume in which and the speed at which such waters are respectively so caused to flow into the drain. In any case all lands from which no water is so caused

to flow into a drain having its outlet in another municipality than that in which the drain was initiated would be exempt from assessment. . . .” Armour C.J.O., in considering the duties imposed upon the engineer by this sub-section, said (*re Tps of Rochester & Mersea* (1901) 2 O.L.R. 435, at p. 436): “He should have ascertained the volume of water which was artificially caused to flow from the lands and roads in each township, including Rochester (the initiating township) into those drains after their completion, and he should have charged the lands and roads in each township from which such volume of water was artificially caused to flow into those drains with the same proportion of the total cost (that is, the total cost less that portion thereof chargeable against lands and roads in the township of Rochester for benefit) which such volume of water bore to the whole volume of water artificially caused to flow from lands and roads in all the townships, including the township of Rochester, into those drains.”

(Section 3a providing for the appointment of drainage viewers and regulating their duties was enacted in 1903 by 3 Edw. VII. Ch. 22 sec. 3., and was repealed in 1906 by 6 Edw. VII. Ch. 37 sec. 8. This legislation was in line with the practice established by The Municipal Institutions Act, C.S.U.C. Ch. 54, under which fence-viewers were entrusted with the duty of locating drains. Similar Acts are in force in some of the United States of America. See *Markley v. Rudy* (1888) 115 Ind. R. 533.)

PETITION FOR CONSTRUCTION.

4. The petition shall be in the form or to the ^{Form of} effect of Schedule A. to this Act. R.S.O. 1897, c. ^{petition.} 226, s. 4.

(See schedule A. under section 3 (1) *supra*).

DUTIES OF ENGINEER OR SURVEYOR.

5. Any engineer or surveyor employed or appointed ^{Oath of} by any municipal council to perform any work under ^{engineer or} the provisions of this Act, including the assessment of ^{surveyor.} real property for the purpose of drainage work, shall, before entering upon his duty, take and subscribe the following oath (or affirmation) before the clerk of the municipality, a Justice of the Peace or a commissioner for taking affidavits, and shall leave the same with, or send it by registered letter to the clerk of the municipality :

In the matter of the proposed drainage work (or as the case may be) in the township of (name).

I (name in full) of the town of _____ in the county of _____ Engineer (or Surveyor) make oath and say, (or do solemnly declare and affirm):

That I will, to the best of my skill, knowledge, judgment and ability, honestly and faithfully and without fear of, favour to, or prejudice against any owner or owners, or other person on persons whomsoever, perform the duty assigned to me in connection with the above work and will make a true report thereon.

Sworn (or solemnly declared and affirmed)
before me at the _____ of _____
In the county of _____ this _____
day of _____ A.D. 1890

A Commissioner, etc. (or Township Clerk or J.P.)

R.S.O. 1897, c. 226, s. 5.

OATH MUST BE TAKEN BY ENGINEER.—In a case where the engineer had taken the oath required by the above section and had made a report upon the proposed work, which was referred back to him by the council of the initiating municipality, and he thereupon made a new report based upon a more extended scheme of drainage, but did not take the oath a second time, it was held by the Court of Appeal that this report was a nullity. (*Tp. of N. Colchester v. Tp. of N. Gosfield* (1900) 27 A.R. 281.) Lister J.A., who delivered the judgment of the Court, said, at p. 285: "The statute for obvious reasons imperatively requires that an engineer who has been appointed by a municipal council to assess and charge the lands of individuals (perhaps against their wish) with the cost of a drainage work shall, before entering upon his duty, be sworn to discharge that duty faithfully and impartially, and it is the right of those whose lands are assessed for such a work to have them assessed by an engineer legally appointed and who is acting under the obligation of an oath."

In an earlier case, (*re Burnett & Town of Durham* (1899) 31 O.R. 262), it was held by Meredith C.J., that where the arbitrator appointed under the provisions of the Municipal Act had failed to take the oath prescribed by that Act before entering on his duties and the appellant was not aware of the omission until after the making of the award, it could not be supported.

In the recent case of *re McCrae & Village of Brussels* (1904) S.O.L.R. 156, Moss C.J.O., delivering the judgment of The Court of Appeal, said (p. 161) that it did not necessarily follow that because the members of a Court of Revision had failed to take the prescribed oath before entering on their duties, their acts were void. But there is no reference made to the earlier cases cited above.

If the oath taken was substantially the same as that prescribed the objection will not be sustained. *Re Smith & Tp. of Plympton* (1886) 12 O.R. 20, at p. 37.

Engineer or
surveyor to
give detailed
accounts of
service, under
oath.

5a.—(1) Any engineer or surveyor employed or appointed to perform any work under the provisions of the said Act shall if required so to do by the council by which he was engaged send in his accounts to the said municipalities for his services, under oath, giving detailed information as to the number of days occupied in superintending the drainage work, the number of days engaged in laying out the work, and the number of days engaged in the office making plans and prepar-

ing his report, also the number of days on which he was engaged in making assessments and inspecting the work, showing the number of hours occupied in each day; and the said account shall also set out whether said work was performed on the works or in the office, and whether the time so occupied was the time of the engineer himself, or that of a clerk or assistant.

(2) The said account upon the written request of the Municipal council or of any person assessed, to be filed with the clerk of the municipality, shall be audited by the county judge free of charge.

(3) The clerk shall deliver the account to the county judge who shall appoint a time and place at which he will proceed with the audit.

(4) The clerk shall give at least two days notice of such audit to the engineer or surveyor and the head of the municipality as well as to any person requiring the audit.

(5) At the time and place named in such appointment the county judge shall audit the account and may disallow any charges which he may deem unreasonable and shall certify thereon the amount to which in his opinion the engineer or surveyor is entitled and the amount disallowed shall not be recoverable by the engineer or surveyor. 3 Edw. VII., c. 22, s. 4; 6 Edw. VII., c. 37, sec. 2.

6. The engineer or surveyor, in assessing the lands to be benefited or otherwise liable for assessment under this Act, need not confine his assessment to the part of the lot actually affected, but may place such assessment on the quarter, half or whole lot containing the part affected as the case may be, if the owner of such part is also the owner of such lot or other said sub-division. Assessment of whole lot or sub-division. R.S.O. 1897, c. 226, s. 6.

That is to say the engineer may assess any parcel of land not containing more than one lot for the benefit which will accrue from the proposed work to a portion thereof only, where the lot or part of a lot assessed is owned by the same person as owns the part affected.

(The cases dealing with assessments on portions of lots will be found collected in the notes appended to section 3 (:) above, under the phrase "portion of lot.")

Apportionment
of assessment
for drainage
work on
sub-division of
land assessed

6a. Where part of a whole lot or of a sub-division or portion of a lot assessed by the engineer has been sold since the final revision of the assessment, the owner of the part so sold and the owner of the remaining portion of the lot or sub-division or portion of a lot so assessed or either of them may give notice to the clerk of the municipality that he requires the said assessment to be apportioned between the owners of the property so assessed and sub-divided, and the township engineer shall thereupon make such apportionment in writing and the same shall be filed with the clerk and shall be by him attached to the original assessment, and shall be binding on the lands assessed in the manner apportioned by the said engineer, and the rate shall thereafter be levied and collected accordingly. The costs of the engineer shall be borne and paid by the parties in the manner which may be fixed or apportioned by such engineer. 62 V. (2) c. 28, s. 4

This section was enacted by the Drainage Amendment Act 1899. The engineer can exercise the powers conferred upon him by this section only where the land in question has been sold since the final revision of the assessment. In cases where a part of an assessed parcel of land is sold between the time of making the assessment and the holding of the Court of Revision it is probable that an appeal would lie to that Court under the provisions of section 32 of the Act, to have the assessment apportioned. There does not appear to be any right reserved to appeal from the decision of an engineer in making an apportionment of an assessment under the provisions of this section.

Assessment
may be shown
in money

7. The assessment upon any lands or roads for any drainage work may be shown by the engineer or surveyor placing sums of money opposite the lands or roads, and it shall not be necessary to insert the fractional part of the whole cost to be borne by the lands or roads. R.S.O. 1897, c. 226, s. 7.

It was held by Street J., in a case where the roads of only one municipality were assessed that an allowance in the engineer's report of a lump sum as "chargeable to municipality for roads" was, under the circumstances, sufficiently definite. (*Re Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423). Where roads of more than one municipality are assessed, the report must distinguish the assessment against each township. (*Re Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523.)

8. The engineer or surveyor, when required by the council, shall make plans, specifications and detailed estimates of the drainage work to be constructed and charge the same to the work as part of its cost. Plans, specifications and estimates.
R.S.O. 1897, c. 226, s. 8.

9. (1) The engineer or surveyor shall in his report and estimates provide for the construction, enlargement or other improvement of any bridges or culverts throughout the course of the drainage work rendered necessary by such work crossing any public highway or the travelled portion thereof; and he shall in his assessment apportion the cost of bridges and culverts between the drainage work and the municipality or municipalities having jurisdiction over such public highway as to him may seem just. Bridges and culverts on highways.
R.S.O. 1897, c. 226, s. 9 (1).

CULVERTS.—A culvert across a street of a lower municipality was used to conduct the waters brought down by an upper municipality to their ultimate outlet. It was held that the cost of its repair and improvement, as set out in the engineer's report, was properly chargeable largely against the upper municipality. (*re Tp. of Camden & Town of Dresden* (1902) 2 O.W.R. 200.)

(2) The engineer or surveyor shall also in his report and estimates provide for the construction or enlargement of bridges required to afford access from the lands of owners to the travelled portion of any public highway, and he shall include the cost of the construction or enlargement of such bridges in his assessment for the construction of the drainage work, and they shall, for the purposes of construction and maintenance, be deemed part of the drainage work. Bridges between highways and private lands.
R.S.O. 1897, c. 226, s. 9 (2).

(2a) Every bridge constructed as part of the drainage work for the purpose of affording access from the lands of owners to the travelled portion of any public highway may, for the purpose of maintaining the same, be deemed to be part of the drainage work, and the maintenance thereof may include any enlargement from time to time rendered necessary by the drainage work. 8 Edw. VII, c. 52, s. 2.

BRIDGES.—It was held by the Court of Appeal in *Fairbairn v. Tp. of S. Sandwich* (1890) 2 C. & S. 133, that if the engineer neglected or refused to make provision in his report for the construction of a bridge, rendered necessary by the digging of the drain, to afford access from the lands of the plaintiff to the travelled portion of the adjoining highway, no right of action was as a result conferred upon the party affected nor was he entitled to appeal to the Court of Revision or to the Referee to have the matter rectified; but that notwithstanding the absence of such right, the Court, on it clearly appearing that the engineer had acted either *mala fide* or upon an erroneous view of the facts, might review the exercise of his powers in this respect. But it is to be noted that when this case was determined the right to appeal to the Referee conferred by sub-section 6 of the present section extended only to matters covered by "the next preceding sub-section," that is to say sub-section 5. In 1902 (2 Edw. VII. Ch. 32 sec. 2) the wording of sub-section 6 was altered, (probably as a result of the animadversions of Osler J.A. in *Thackery v. Tp. of Ralegh* (1898) 25 A.R. 226 at p. 230) by striking out the limiting words, and by inserting in their stead "this section." By this alteration the right to appeal was extended to cover all the matters dealt with in the various sub-sections of section 9.

Farm bridges.

(3) The engineer or surveyor shall in the same manner provide for the construction or enlargement of bridges rendered necessary by the drainage work upon the lands of any owner, and shall fix the value of the construction or enlargement thereof to be paid to the respective owners entitled thereto, but the land assessed for the drainage work shall not nor shall any municipal corporation be liable for keeping such bridges in repair. R.S.O. 1897, c. 226, s. 9 (3).

"Bridges. . . upon the lands of any owner."

This sub-section makes provision for the construction or enlargement of farm bridges, where it is necessary to construct or enlarge such bridges to afford the necessary access from one part of a farm to another part of it which has been severed as a result of the digging or enlargement of a drainage work.

Although no express provision to assess as part of the cost of a drainage work, the cost of building such farm bridges as were rendered necessary by the digging of the drain was made before 1894, the Courts nevertheless allowed the cost of such bridges as an element of compensation in claims made under the provisions of the Act. (*Re Hodgson & Tp. of Bosanquet* (1886) 11 O.R. 589; *re Byrne & Tp. of Rochester* (1889) 17 O.R. 354.)

The value of any farm bridge, the construction (where the drain is a new work) or enlargement (where the drain is being enlarged or altered) of which is found necessary by the engineer, is to be paid to the owner of the land through which the drain is dug. The owner of the land affected is to construct his own bridge with the money paid him. (*See Thackery v. Tp. of Ralegh* [1898] 25 A.R. 226, per Osler J.A. at p. 230.)

(4) The engineer or surveyor shall likewise in his report estimate and allow in money to any person, company or corporation the value to the drainage work of any private ditch or drain, or of any ditch constructed under any Act respecting ditches or watercourses which may be incorporated in whole or in part into such drainage work or used therewith. R.S.O. 1897, c. 226, s. 9 (4). ^{Allowing for private ditches, etc}

Where a ditch which had been constructed under The Ditches and Watercourses Act was incorporated in a drainage scheme initiated under the Act and the engineer had made no allowance to the parties who had constructed it Drainage Referee Hodgins set aside the report, saying that the Act recognized a proprietary right in the parties who have constructed or paid for a ditch, and that its present value for the purposes of the proposed drain must be ascertained and allowed. *Tp. of Euphemia v. Tp. of Brooke* (1898) 1 C. & S. 358.

(5) The engineer or surveyor shall further in his report determine in what manner the material taken from any drainage work, either in the construction or repair thereof, shall be disposed of, and the amount to be paid to the respective persons entitled for damages to lands and crops (if any) occasioned thereby, and shall include such sums in his estimates of the cost of the drainage work or the repairs. R.S.O. 1897, c. 226, s. 9 (5). ^{Disposal of material taken from drainage work.}

The powers conferred upon the engineer by this sub-section to estimate and allow as part of the cost of a drainage work such sums as shall be sufficient to compensate landowners through whose property the drain is to be constructed for the damage that will result to their lands and crops by spreading the material taken from the drain upon them were apparently granted with the object of anticipating and settling claims of this character which would otherwise be made and litigated under the provisions of section 93 of the Act.

It was held by Drainage Referee Britton in *Wilkie v. Village of Dutton* (1893) (1 C. & S. 1) at p. 134 that an engineer was not justified in setting off the estimated damages to be caused by spreading earth taken from the drain, against benefit to accrue to the lands damaged from the construction of the drain, and to thereupon omit such lands from assessment. A similar opinion was expressed at a later date by Osler J.A. in *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 236, who said that such a balancing off of benefit against damage would deprive the landowner of his right to appeal from the assessment made against his lands for benefit and that no such power has been conferred upon an engineer by the Act.

Appeal to
referee.

(6) Any owner of lands affected by the drainage work, if dissatisfied with the report of the engineer in respect of any of the provisions of this section, may appeal therefrom to the Referee, and in every such case the notice of appeal shall be served upon the head of the council of the initiating municipality and the clerk thereof within 10 days after the adoption of the engineer's report by the council, and the further proceedings, on such appeal shall be as hereinafter provided in other cases of appeals to the Referee. The Referee, on an appeal under this subsection, may make such order as to him seems just, and his decision shall be final. R.S.O. 1897, c. 226, s. 9 (6); 2 Edw. VII., c. 32, s. 2.

Before this sub-section was amended in 1902, the right to appeal conferred by it was limited to the matters dealt with by sub-section 5. (See notes to sub-section 2 of this section.) A right to appeal to a Referee is now granted "in respect of any of the provisions of this section." By 4 Edw. VII. Ch. 10, sec. 50 (1904), section 8a as enacted by 2 Edw. VII. Ch. 32 sec. 1, providing for assessing damages to compensate the owners of low lying land for injuries by flooding in certain cases, was struck out and re-enacted as sub-section 10 of section 9. By this adjustment the right to appeal conferred by the above sub-section automatically applies to cases arising under the new sub-section 10.

Notice to
person
assessed.

(7) Forthwith upon the filing of the engineer's report with the clerk of the municipality, the clerk shall by letter or postal card, notify the parties assessed of such assessment, and of the amount thereof. In case more than one municipality is interested in the proposed work, the clerk of such other municipality or municipalities shall forthwith upon the filing of a copy of the engineer's report in their office, notify the parties assessed of such assessment and the amount thereof. And he shall also in like manner notify each of the owners of lands in respect of which the report provides for compensation of the date of filing the report, the amount awarded to such owners for compensation and the date of the council meeting at which the report will be read and considered. 62 V. (2), c. 28, s. 5; 2 Edw. VII., c. 32, s. 3.

This sub-section should be considered in conjunction with section 16 of the Act, which makes somewhat similar provisions as

to notifying persons assessed, but which differs in some material respects. The first sentence of this sub-section dates from 1896 (59 Vic. Ch. 66 sec. 1); The second sentence from 1899 (62 Vic. (2) Ch. 28 sec. 5); and the last sentence came into existence in 1902 (2 Edw. VII. Ch. 32 sec. 3.) Osler J.A. speaking of this sub-section as it then stood, (*Challoner v. Tp. of Lobo* (1901) 1 O.L.R. 156, at p. 162) said: "I hardly see what object was intended to be served by it, as the existing law (i.e. section 16) had already provided more fully for giving notice of the report to the parties assessed." But it will be noted that as a result of the successive amendments, this sub-section now differs materially from section 16. The latter section provides for a notice to be given only "to all parties assessed within the area described in the petition," while sub-section 7 above casts a duty upon the municipal clerks to notify all persons assessed within their respective jurisdictions, whether the assessed lands are within the area described in the petition or without it, and whether they lie within the bounds of the initiating municipality or within the bounds of an adjoining municipality. Section 61 of the Act requires the initiating municipality to serve a copy of the engineer's report, plans, etc., upon the head of any other municipality affected by the proposed work. The last sentence in sub-section 7 above provides for the giving of a notice of assessment to a class of persons who do not come within the terms of section 16.

(8) The report of the engineer shall be filed within ^{Time for filing report of engineer.} six months after the filing of the petition; or within such further time as the council may in their discretion from time to time appoint, and the council may adopt the report of the engineer if they see fit notwithstanding that such report is made after the six months herein fixed for making the same or after any extended period fixed by the council under this sub-section. 62 Vic. (2), c. 28, s. 6, as amended by 7 Edw. VII., c. 42, s. 3.

TIME FOR FILING REPORT. RE McKENNA & TP. OF OSGOODE.—The extensive alterations made in the provisions of this sub-section by the legislation of 1907 were apparently intended to overcome and do overcome the effect of the judgment of the Court of Appeal in, *re McKenna & Tp. of Osgoode* (1906) (13 O.L.R. 471, 8 O.W.P. 713.) As it stood at the date of the hearing of this case this sub-section read: "The report of the engineer shall be filed within six months after the filing of the petition; provided that upon the application of the engineer the time for filing the report may be extended from time to time for additional periods of six months, when council is satisfied that owing to the nature of the work it was impracticable for the report of the engineer to be completed within the time limited by law." Moss C.J.O. said in the case cited, that the power to extend the time for filing the engineer's report was "a limited power to extend for good cause. That its exercise was dependent upon inability of the engineer owing to the nature of the work to file his report at an earlier date, and not upon dilatoriness or supineness on his part." In this case

the engineer had been instructed to make an examination and report in August, 1900. He did not commence his duties within the first six months after his appointment. A number of extensions were afterwards granted him by the council, but some of these were given after previously extended periods had expired, so that, under the section as it then stood, there were intervening periods when he had no right or authority to proceed with the work. No report was filed until February, 1905, and the nature of the contemplated work afforded no excuse for the delay. The Court held that a report made after such an inexcusable delay must be set aside.

The result of the recent amendment would appear to be to leave it entirely to the discretion of the initiating council whether or not it should adopt an engineer's report made and filed after the expiry of the six month period or of any subsequent extension thereof, and that its action in this respect would not be subject to review by the Courts, in the absence of some such ground as fraud or *mala fides*, no matter how long the intervening delay might be.

WORK SHOULD BE COMPLETED WITH DESPATCH.—The alteration which the sub-section has undergone has not, however, rendered less applicable the sound reasons for a speedy completion of a drainage work, pointed out by Moss C.J.O. in his judgment in *re McKenna & Tp. of Osgoode*, at p. 474: "The obvious intent of the Drainage Act is that work to be performed under its provisions shall be proceeded with and brought to a termination with reasonable expedition. The nature of the injury from which relief is sought demands that there shall be no unreasonable delay in supplying the remedy which the owners of the lands to be benefited are seeking. To unduly delay may and is almost certain to prove a serious prejudice, not only on account of the withholding of the remedy, but because of the inevitable changes in the title and proprietorship of the lands in the area described in the petition which lapse of time is almost certain to bring about. It is the duty of the council of the municipality, once it has undertaken the prosecution of the drainage scheme petitioned for, to see that it is proceeded with as promptly as the circumstances of the case permit, and to allow no undue delay on the part of the engineer in making and filing his report."

It will be noted also that by section 9a as enacted by sec. 4 of 7 Edw. VII. Ch. 42, (1907) it is provided that no by-law shall be quashed or declared void, where no application to that end has been made within the time limited by the Act for that purpose, by reason only that the report of the engineer has not been filed within the period of six months or within any additional period appointed by the council under the provisions of sub-section 8.

If engineer neglects to do work council may appoint another.

(9) In case the engineer neglects to make his report within the time limited by the preceding subsection, or within the time fixed by the council under the said subsection, he shall forfeit all claim for compensation for the work done by him upon the drain, and the council may employ some other engineer to make the examination, report and assessment required by the preceding section. 62 V. (2), c. 28, s. 6.

It was pointed out in *re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 471, that the appointment of another engineer under the provisions of this sub-section is a means of preventing a proposed drainage work being abandoned through the default of the engineer appointed in the first instance.

(10) Where, in the opinion of the engineer or surveyor, the cost of continuing the drainage work to a point where the discharge of water will do no injury to lands and roads, will exceed the amount of injury likely to be caused to low lying lands below the termination of the work, he may instead of continuing the work to such a point, include in his estimate of the cost of the drainage work a sufficient sum to compensate the owners of such low lying lands for any injuries they may sustain from the drainage work, and he shall in his report determine the amount to be paid to the respective owners of such low lying lands in respect of such injuries. 2 Edw. VII., c. 32, s. 1; 4 Edw. VII., c. 10, s. 50.

Assessment of compensation for damage to low lands instead of constructing drain to an outlet.

This section was enacted in 1902, previously to which date there was no power to drown or injure lands by the construction or operation of a drainage work and to assess the damage as part of the cost of the work.

Apart from the statutory powers conferred by the above section a municipality has no authority to initiate a drainage scheme which will result in water being emptied upon the lands of persons who do not consent thereto, or which will conduct the water drained by it to an insufficient outlet. (*Re Tps. of Raleigh & Harwich* (1899) 26 A.R. 313; *Chapel v. Smith* (1890) 80 Mich. 100; *Bruggink v. Thomas* (1900) 125 Mich. 9.)

"To a point, etc."

This is in short to a 'sufficient outlet' as defined by section 2 (11) of the Act.

"He may . . . include . . . a sufficient sum to compensate. . ."

Compensation payable to a landowner for damages sustained by him by reason of the construction of a drainage work must not be set off against any assessment levied against his lands for benefits to be conferred by the proposed work. Each of such matters must be kept distinct and separate. (*Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226 at p. 236.)

"Of such low lying lands."

NO AUTHORITY TO FLOOD ROADS.—It will be noted that no power is conferred upon an engineer authorizing him to conduct the contents of a drain onto a road and let them lie there, on compensating the municipality for the damages sustained. And this, because, as was said by Drainage Referee Hodgins (*Tp. of Euphemia v. Tp. of Brooke* (1898) 1 C. & S. 358 at p. 359) "Of the

two municipal interests, which are confided by the Legislature to municipalities, highways and drainage, the care of highways must be their paramount duty; drains and drainage systems must be considered as the subordinate duty. Highways are for the benefit of the public at large. Drainage schemes can only be undertaken at the instance of and for the benefit of private persons and sometimes for the benefit of localities."

9a. To remove doubts it is hereby declared that where any by-law has been passed by the council of any municipality for the construction of any drainage work under this Act, upon a report of the engineer which has been adopted by the council, and where the time for moving to quash such by-law has expired under this Act, and no application to quash the same has been made, such by-law shall not be quashed or declared void or illegal in any proceedings taken respecting the same by reason only that the report of the engineer has not been filed within six months after the filing of the petition provided for in this Act, or within the extended period provided for in sub-section 8 of this section. 7 Edw. VII., c. 42, s. 4.

Any litigation pending at the time of the enactment of this section is excepted from its provisions.

Spreading
earth and re-
moving timber
on road
allowances.

10. When a drainage work is to be constructed on or along a road allowance the engineer or surveyor shall, upon the application of the municipal council controlling such road allowance, place in his estimate of the cost of the work a sum sufficient to close-chop, or grub and clear not less than twelve feet of the middle of the road allowance (if required) and to spread thereon the earth to be taken from the work, and shall charge the cost thereof to the municipality, together with its proportion of the cost of the drainage work. R.S.O. 1897, c. 226, s. 10.

Engineer to
apportion
work of
cleaning out
drains among
owners.

10a. Such by-law may further provide that the engineer or surveyor shall in his report state the portion of the said drain already or thereafter to be constructed which shall be by each owner assessed for benefit, cleaned out and kept clear and free from obstructions and in good order as prescribed by the above section 77a of this act. 63 V., c. 38, s. 2 (2).

DISTINGUISHING ASSESSMENTS.

57

This section and section 77a, which provides generally and more in detail for passing by-laws to apportion the cleaning out of drains were brought into existence by The Drainage Amendment Act 1900. (63 Vic. Ch. 38.)

COVERING DRAINAGE WORK.

11. Where the engineer or surveyor reports in favour of covering the whole or any part of a drainage work constructed under this Act, he shall determine and state in his report the size and capacity thereof and also the material to be used in its construction, and all the provisions of this Act shall apply thereto in the same manner and to the same extent as to an uncovered or open drainage work, but in no case shall the improvement of a creek, stream or natural water course be made into a covered drainage work unless it provides capacity for all the surface water from lands and roads draining naturally towards and into it, as well as for all the waters from all the lands assessed for the drainage work. R.S.O. 1897, c. 226, s. 11.

Report on covering drains.

"But in no case shall the improvement of a creek . . . be made into a covered drainage work unless it provides capacity for all the surface water, etc."

This saving clause would appear to be intended to safeguard the natural right possessed by riparian landowners to drain their lands into adjacent watercourses, providing that they do not use artificial channels to do so, without liability for damages and without assessment.

DISTINGUISHING ASSESSMENTS.

12. The engineer or surveyor shall, in his report, assess for benefit, outlet liability and injuring liability, and shall also in his assessment schedule, insert the sum charged for each, opposite the lands and roads liable therefor respectively, and in separate columns. R.S.O. 1897, c. 226, s. 12.

Engineer to distinguish assessments.

"Insert the sum charged for each."

It has been repeatedly held that an engineer's report or the by-law based upon it is invalid, if he has not distinguished and classified the assessments he has levied, according to benefit, injury and outlet, and shown separately in his schedules the amount levied against each parcel of land under each of these headings, where one or more element of the unclassified assessment is not authorized. (*Re Tps. of Orford & Howard* (1891) 18 A.R. 496, at p. 501; *Tp.*

Stephen v. Tp. of McGillivray (1891) 18 A.R. 516, at p. 528 ;
Tp. of Romney v. Tp. of N. Tilbury (1893) 1 C. & S. 113.)

Drainage Referee Britton in delivering judgment in *Tp. of Romney v. Tp. of N. Tilbury* (1893) 1 C. & S. 113, said (p. 115): "I think the assessments should be so particular and specific that every person whose land is charged can ascertain precisely why he is charged as well as for what amount. I do not say that a report should be voided for a trifling error or omission, but it is an entirely different thing when it omits to state, and when the engineer is not able to state in the case of an assessment made for benefit and for outlet, how much the assessment is for either."

"*Shall. . . assess.*"

See notes collected under "to make an assessment," section 3 (1) ante.

Prior
assessments
to be taken
into
consideration.
1

13. In fixing the sum to be assessed upon any lands or roads, the engineer or surveyor may take into consideration any prior assessment on the same lands or roads for drainage work and repairs and make such allowance or deduction therefor as may seem just, and he shall, in his report, state the allowance made by him in respect thereof. R.S.O. 1897, c. 226, s. 13.

This section giving the engineer power to consider prior assessments and make allowance for them came into force in 1894. Prior to that date, by 53 Vic. Ch. 50 sec. 33 (1890), a like power to consider prior assessments was conferred upon the Court of Revision and Judge, in appeals taken before them, now embodied in section 38 of the Act. Section 38 is expressly made applicable to works both of construction and of repair. These sections would appear to be intended to limit and adjust in some reasonable manner the total of successive assessments for drainage works charged against the same parcel of land, which might otherwise, in an extreme case, be taxed in the aggregate, a greater sum than the value of the land assessed.

In construing this section, in the case of *Tp. of S. Dorchester v. Tp. of Malahide* (1895) 1 C. & S. 275, Drainage Referee Britton said: "I am strongly of the opinion that the engineer cannot take into consideration and make an allowance for a prior assessment for benefit, charging the amount of such allowance to other lands which are only assessed for outlet or injuring liability. In applying this section it must be only when assessments are of the same kind, as for example, when certain lands are assessed for benefit, and other lands omitted which were also benefited, then in subsequent work of construction and maintenance these prior assessments may be taken into consideration and allowance made therefor; and similarly in cases of outlet and injuring liability. I cannot understand why land benefited by a drainage work and assessed for this benefit should be relieved of this benefit assessment by charging it upon lands in the same or other townships for outlet liability."

14. The engineer or surveyor aforesaid shall determine and report to the council of the municipality by which he was employed, whether the drainage work shall be constructed and maintained solely at the expense of such municipality and the lands assessed therein, or at the expense of all the municipalities interested, and the lands therein assessed, and in what proportions. R.S.O. 1897, c. 226, s. 14.

Engineer to report as to whether or not other municipalities are interested and how.

If lands in an adjoining municipality are to contribute to the cost of a drainage work, under any of the circumstances provided for by sections 57 to 60 inclusive of the Act, then by section 61 it becomes the duty of the initiating municipality to serve a copy of the report, etc., upon the head of such other municipality.

"And maintained."

In a case where the engineer's report said nothing as to the cost of maintenance and the proportions in which such cost should be borne, Meredith C.J. held that these omissions, in conjunction with other irregularities in the proceedings, were sufficient grounds for setting aside the by-law. *Cassidy v. Tp. of Mountain* (1897) 17 C.L.T. Occ. N. 417.

The duty of the engineer under this section to apportion the cost of maintenance of a drainage work should be read in conjunction with, and as qualified by, sections 68 and 69 of the Act which embody more detailed regulations for the maintenance of drainage works.

FILING REPORT.

15. As soon as the engineer or surveyor has completed his report, plans, specifications, assessments and estimates, he shall file the same with the clerk of the municipality by which he was employed. R.S.O. 1897, c. 226, s. 15.

Engineer to file report

Where an engineer after having filed his report withdrew it and substituted another report in its stead, and the latter report was accepted by the municipality, Referee Britton held that the by-law based upon the second report was not to be impeached on this ground. *Tp. of S. Dorchester v. Tp. of Malahide* (1895) 1 C. & S. 275.

The report must be filed within six months after the filing of the petition, unless the council of the initiating municipality grant an extension of time. See sec. 9 sub-sec. 8 above.

Cf. sub-sections 9 (7) and 9 (8) above and notes thereto.

NOTICE TO PERSONS ASSESSED.

16. The clerk of the municipality shall notify all parties assessed within the area described in the petition, by mailing to the owner of every parcel of land

Clerk to notify parties assessed.

assessed therein for the drainage work, a circular or postal card upon which shall be stated the date of filing the report, the name or other general designation of the drainage work, its estimated cost, the owner's lands and their assessment, distinguishing benefit, outlet liability and injuring liability, and the date of the council meeting at which the report will be read and considered, which shall be not less than ten days after the mailing of the last of such circulars or postal cards, and the determination of the council as to the sufficiency of notice or otherwise shall be final and conclusive. R.S.O. 1897, c. 226, s. 16.

OBJECT OF SECTION.—*Lister J.A.*, in delivering the judgment of the Court of Appeal in *Priest v. Tp. of Flos* (1901) 1 O.L.R. 78 at p. 84, said: "The evident purpose of the notice is not only to inform an owner that his lands have been assessed for the cost of a contemplated drainage work, but to afford him such information as will enable him to promote or oppose the scheme at the council meeting to be held under section 17, at which the engineer's report must be read and considered."

"Shall notify."

Failure to notify the parties assessed whose lands lie within the area described in the petition, or any considerable number of them, of the date of the council meeting at which the report is to be considered, should they as a result be deprived of an opportunity to be present at such meeting, would render the proceedings irregular and open to attack, and particularly if such parties were sufficient in number to have reduced the required majority to a minority had they been present at such meeting and withdrawn from the petition. (*Re Hodgins & City of Toronto* (1896) 23 A.R. 80 at p. 83; *re McCrae & Village of Brussels* (1904) 8 O.L.R. 156 at p. 159; *Wright v. Wilson* (1883) 95 Ind. 408.)

In *re Hodgins & City of Toronto supra* Hagarty C.J.O. said (p. 83): "An assessment charging lands has always been considered a judicial act, of which the party affected must have notice and be allowed to be heard."

CHANGE IN OWNERSHIP DURING PENDENCY OF PROCEEDINGS. It has been held (*Chaney v. The State* (1888) 113 Ind. 404) that a purchaser of land during the pendency of a drainage petition, from a grantor who was named in the petition and who had received notice of the proceedings thereunder, is bound by the proceedings to the same extent as though he had held the legal title when the petition was filed and had been named therein and duly notified.

UNREGISTERED OWNER.—It has also been held in a case arising under the drainage statutes of the same state (*Bell v. Cox* (1889) 122 Ind. 153) that an owner of land who has failed to put his title on record cannot complain if he is not notified of drainage proceedings, but that such a person, on making application, may have a voice in subsequent proceedings.

CONSIDERATION OF REPORT.

17. The municipal council shall at the meeting mentioned in such notice, immediately after dealing with the minutes of its previous meeting, cause the report to be read by the clerk to all the ratepayers in attendance, and shall give an opportunity to any person who has signed the petition to withdraw from it by putting his withdrawal in writing, signing the same and filing it with the clerk, and shall also give those present who have not signed the petition an opportunity so to do; and should any of the roads of the municipality be assessed, the council may by resolution authorize the head or acting head of the municipality to sign the petition for the municipality, and such signature shall count as that of one person benefited in favour of the petition. R.S.O. 1897, c. 226, s. 17.

Proceedings
at meeting for
consideration
of report

RIGHT TO WITHDRAW.—The present statutory right of a petitioner to withdraw his consent to a proposed drainage work was given by The Municipal Amendment Act 1890. (53 Vic. Ch. 30 sec. 35.) Previously to the enactment of this provision it had been held by Wilson C.J. in *Misener v. Tp. of Mainfleet* (1882) 46 U.C.Q.B. 457, that petitioners might withdraw their names while the matter was still under consideration by the council and before the work had been actually undertaken. In delivering judgment in this case, Wilson, C.J. said: "The estimates of the cost of the work and the assessment to be made of the real property that will be benefited and the proportion of benefit that will be derived by each lot or part of lot, are made as much for the information and service of the petitioners and others interested in the work and in the cost of it as of the council; and it would seem to me to be clear that the petitioners, or any one or more of them, upon the report of the engineer or surveyor may, if of opinion the work is too costly or will bear too heavily upon them or any of them abandon the project and withdraw from the petition, because the preliminary examination, estimate, assessment and value of supposed benefit are made to enable the parties to determine whether they will proceed with the proposed work or not."

A similar decision was rendered in a case determined under the Illinois drainage act, which contains no express statutory provision permitting petitioners to withdraw. (*Mack v. Polecat Drainage Dist.* (1905), 216 Ill. 56.)

In *Gibson v. Tp. of N. Easthope* (1894) 21 A.R. 504, aff. 24 S. C.R. 707, the judges of the Court of Appeal divided in opinion as to whether a right to withdraw existed prior to the enactment of 1890.

It was said by Osler J.A. in this case (21 A.R. 504, at p. 516) that the withdrawal must be absolute and unconditional, and that the township was not bound to notice any other.

Where a township had agreed to the purchase of a dam for removal in connection with a proposed drainage work, under section 80 of the Act, Drainage Referee Hodgins held that it might withdraw its consent before the by-law was passed, subject to such terms as to costs and indemnity as might be imposed. (*Tp. of Augusta v. Tp. of Oxford* (1897) 1 C. & S. 345.)

It will be noted that by section 18 of the Act, petitioners who withdraw are penalized, should the drainage scheme as a result have to be abandoned, by having to pay double their proportionate share of the expenses incurred up to that time.

WHAT OWNERS ARE ENTITLED TO SIGN.—It has been held by the Court of Appeal (*Challoner v. Tp. of Lido* (1901) 1 O.L.R. 156, aff. 32 S.C.R. 505) that only those landowners whose names appear upon the assessment roll last revised at the date of the petition as owners of the lands to be drained are entitled to add their names to the petition at this meeting. Osler J.A. in his judgment in this case said (p. 162): "At that stage other persons who might have signed the petition are given the right to support it by adding their names thereto. But these persons must have been on the roll on which the proceedings were initiated. I think that is what is meant by 'shown as aforesaid' in section 18. It cannot have been intended that there should be two 'last revised assessment rolls' which would be the case if these new signatories were to be ascertained from a later roll than that on which the petition was based." And on this point further reference may be made to the judgment of Armour C.J.O., in the same case at pp. 158 and 159.

A right similar to that in force in this Province, by virtue of this section, entitling an interested landowner to add his name to the petition has been declared to exist in Indiana. (*Zumbro v. Parnin* (1895) 141 Ind. 430.)

The status of petitioners cannot be enquired into further than to ascertain whether they are entered upon the last revised assessment roll of the date of the petition, as owners of land which will be benefited by the proposed drain. The roll is conclusive evidence of the right to sign. (*Tp. of Warwick v. Tp. of Brace* [1901] 1 O.L.R. 433.)

OBJECTIONS TO SIGNATURES, HOW TAKEN.—Should any interested ratepayer desire to object to certain names which appear upon the petition being counted, upon the ground that the signatures are not genuine, or that they were obtained by fraud, or by misrepresentation or for other like reasons, he is entitled to petition the council and to have a time and place appointed at which to produce his evidence and to substantiate his charges. And if they are well founded the council is bound not to count the signatures of such parties. (Con. Municipal Act 1903, secs. 336 and 337; *re Robertson v. Tp. of N. Easthope* (1889) 16 A.R. 214, at p. 222; *Gibson v. Tp. of N. Easthope* (1894) 21 A.R. 504, at p. 510.) It has been held that an unsuccessful attack upon the sufficiency of the petition launched under these sections is not necessarily a bar to a subsequent application to quash the by-law upon the same grounds. (*Re Robertson v. Tp. of N. Easthope* (1889) 16 A.R. 214.)

EFFECT OF WITHDRAWAL FROM PETITION.

18. Should the petition at the close of the said meeting of the council contain the names of the majority of the persons shown as aforesaid to be owners benefited within the area described in such petition, the council may proceed to adopt the report and pass a by-law authorizing the work, and no person having signed the petition shall after the adoption of the report be permitted to withdraw; but if after striking out the names of the persons withdrawing, the names remaining, including the names, if any, added as provided by section 17 of this Act, do not represent a sufficient number of owners within the area described to comply with the provisions of section 3 of this Act, then the persons who have withdrawn from the petition shall on their respective assessments in the report with one hundred per centum added thereto, together with the other original petitioners on their respective assessments in the report, be, *pro rata*, chargeable with and liable to the municipality for the expenses incurred by said municipality in connection with such petition and report, and the sum with which each of such owners is chargeable shall be entered upon the collector's roll for such municipality against the lands of the person liable, and shall be collected in the same manner as taxes placed on the roll for collection. R.S.O. 1897, c. 226, s. 18; 6 Edw. VII., c. 37, s. 3.

Withdrawing
from petition.

"Should the petition . . . contain the names of the majority . . ."

It was said by Hagarty C.J.O., in this connection, in, *re Robertson & Tp. of N. Easthope* (1889) 16 A.R. 214, at p. 219: "In all cases of this kind—largely invading the rights of private property—it should, I think, be incumbent on the council to be certain beyond speculation or guess work that a majority of those interested had clearly sanctioned the proposed work so as legally to found jurisdiction to bind a dissentient minority." And by MacLennan J.A. in the same case (at p. 222): "If the council found out for themselves that the petition was insufficiently signed, it was just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it." Gwynne J., speaking of a by-law passed under a clause of the Municipal Act *in pari materia*, said (*re Morel & City of Toronto* [1872] 22 U.C.C.P. 323): "Such by-laws should in every case be passed subsequently to and consequently upon, the presentation of the required petition, and after the fullest

opportunity had been given to every ratepayer, to be affected by the by-law, to object to its being passed."

"Shown as aforesaid."

(See citation from *Challoner v. Tp. of Lake* (1921) 1 O.L.R. 156, at p. 162, cited above under section 17.)

"To be owners benefited within the area described in such petition."

The words "in such petition" were added by the amending Act of 1906, (6 Edw. VII, Ch. 37 sec. 3.) The effect of this amendment, in conjunction with a like amendment in the wording of section 3 (1) of the Act (6 Edw. VII, Ch. 37 sec. 1.) has been to definitely settle the question whether the required majority of owners is to be ascertained by reference solely to the area described in the petition as lands which will receive benefit from the proposed work, or by reference to that which in many cases is a much more extended area, the lands assessed by the engineer for contribution to the cost of the proposed drain. Thus in *re Robertson & Tp. of N. Easthope* (1889) 16 A.R. 214 at p. 219, Hagarty C.J.O. expressed the opinion of the Court of Appeal upon this point by saying: "It may often happen that the result of the survey shows a much larger area of land to be benefited than the designated in the petition. There ought to be, in my judgment, an absolute majority of all owners declared liable to assessment and contribution before those opposed to the scheme can lawfully be bound." See also *re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 471 at p. 476. These cases, and the additional cases in agreement with them cited above under section 3 (1), as a result of the amendments referred to above, do not now correctly interpret the meaning of the Act upon this point.

"The council may proceed."

The Act is permissive only, not compulsory, and the council may adopt, refer back, or reject a proposed drainage scheme accordingly as they may consider their action warranted by the circumstances. Gwynne J. in his judgment in *Williams v. Tp. of Raleigh* (1892) 21 S.C.R. 103, said in this connection (at p. 116): "Now it is to be observed that the drainage clauses under consideration do not require the corporation or its municipal council to do anything whatever for the purpose of draining drowned lands. They simply empower the council of the corporation to employ an engineer or surveyor to make an examination of the land proposed to be drained, and to make a plan and to report as to whether and in what manner in his opinion, the lands proposed to be drained can be drained; and if the council shall be of opinion that the work as proposed by such engineer or surveyor is desirable they may pass a by-law for the purpose. There is no compulsion whatever imposed upon the council to adopt the plan as proposed by their engineer or surveyor. The person so employed is their servant. He may be an ignorant and unskilled person, and if he be, or whether he be or not, the council cannot shirk the responsibility cast upon them of exercising their own judgment in determining whether they shall or shall not adopt the plan as suggested by their servant. If they do adopt it it is their own work, for all the consequences attending which they must be responsible, except in so far as they are protected by the statute authorizing them to use their discretion in the matter."

(See also *Van Egmond v. Town of Seajorth* (1884) 6 O.R. 599, per Oiler J.A. at p. 610, cited above under section 3 [1].)

"To adopt."

COUNCIL MAY REFER BACK REPORT.—Lord McNaughten in delivering the judgment of the Privy Council in the appeal of *Tp. of Raleigh v. Williams* (1893) A.C. 540, said (p. 550): "Their Lordships do not agree... that municipalities are helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineer's plan themselves. They cannot of their business. But they may return the plan for amendment if they think it is not desirable in the shape submitted to them." But if the council desire to refer back the scheme to the engineer for amendment, they must do so before they adopt his report. (*Priest v. Tp. of Flos* [1901] 1 O.L.R. 78.) Speaking for the Court of Appeal, Lister J.A., said in this case, p. 85: "After the adoption of the report, the council of their own motion have no more power to change the plan or scheme of the work than the petitioners have to withdraw from the petition. The scheme assented to by the ratepayers and adopted by the council is the only one which the council could, by by-law, authorize to be carried out."

Where the engineer attended the council meeting and before his report had been adopted amended the assessment of certain lots by distributing the amount assessed according to the ownership of the fractional parts of the lots, this being done in the presence of the parties concerned who received notice of the change and the clerk was subsequently notified, the Court of Appeal decided that this did not constitute a valid objection to the by-law subsequently passed with the amended assessments. *Challoner v. Tp. of Lobo* (1901) 1 O.L.R. 156 at p. 159.

ABANDONING SCHEME WHERE PETITION INSUFFICIENT.—If the signatures to the petition are not at the close of the meeting of the council sufficient in number to give the council jurisdiction to go ahead with the work the scheme is, of course, at an end. In such a case the Act provides that the costs incurred in the proceedings taken up to that time shall be borne by the ratepayers who in the first instance set the scheme in motion by signing the petition. The share of the expenses to be paid by each of the original petitioners who has not withdrawn his name is to be ascertained by taking such an amount as will bear the same ratio to the total expense as his assessment for the proposed work would bear to the total assessment. But the share of such of the original petitioners as have afterwards withdrawn their names is to be twice what it otherwise would have been, that is whatever proportion twice his assessment bears to the whole assessment, is to be his share of the expense incurred.

But if at the close of the meeting of the council called to consider the report, the council declines to adopt the report and sanction the undertaking of the work, notwithstanding that the petition is sufficiently signed to vest it with jurisdiction, how and by whom are the expenses already incurred to be discharged? No provision is made by this section covering such a case, nor is such provision made elsewhere in the Act unless section 86 is broad enough to cover it by implication. The municipality is doubtless, as in all other cases, responsible for the payment of the costs incurred by this impasse, at the first instance; but is it justified in passing them off upon the petitioning owners? It has been held that the municipi-

pality is simply a trustee or surety for the petitioners, and is therefore to be indemnified against all costs and expenses properly incurred by it in carrying out the provisions of the Act. (*White v. Tp. of Gosfield* (1882) 2 O.R. 287 at p. 298; *Tp. of Sombra v. Tp. of Chatham* (1891) 18 A.R. 252 at p. 268.) And it has been said that the engineer's report is prepared "as much for the information and service of the petitioners and others interested in the work and the cost of it as of the council." (*Misener v. Tp. of Wainfleet* (1882) 46 U.C.Q.B. 457.) Now if the result of the engineer's examination has been to demonstrate that the petitioners were seriously mistaken as to the magnitude and cost of the proposed drain, or as to the burden that its completion will impose on non-petitioning owners it would appear to be just that the petitioners should bear the cost of the abortive undertaking. There is no provision for collecting such expenses by entry on the collectors' roll against the lands of the petitioners, but it may be doubted whether the municipality could not recover the amount expended by proceedings against the petitioners, instituted in the manner provided for by section 93 of the Act.

BY-LAWS.

What by-laws
May be passed
by council.

19. Should the council of the municipality in which the lands and roads described in the petition lie, be of the opinion that the drainage work proposed in said petition, or a portion thereof, would be desirable, the council may pass a by-law or by-laws;—

"Or a portion thereof."

If the Council are of opinion that the construction of part only of the drainage work petitioned for is desirable, it is suggested that they could not lawfully proceed to pass a by-law authorizing the undertaking of a portion of the work unless the engineer had first reported to that effect. (*Williams v. Tp. of Raleigh*, 1893, A.C. 540 at p. 550; *Priest v. Tp. of Flos* (1901) 1 O.L.R. 73 at p. 85.) Nor would such a course of action seem justified unless the portion which it is proposed to dig is in itself complete, nor unless the majority of owners within the lesser area had signed the petition and approved of the work being undertaken in the manner proposed.

"May pass."

It is entirely optional with the council whether they shall authorize the undertaking of the work or not. (*Van Egmond v. Town of Seabrook* (1884) 6 O.R. 599 at p. 610; *Williams v. Tp. of Raleigh* (1892) 21 S.C.R. 103, at p. 116.)

PROCEDURE IN PASSING A BY-LAW.—The by-law is first passed provisionally, then published, as provided for by section 21 of the Act, and afterwards finally passed. Its final passing can only properly take place after the sittings of the Court of Revision have been held, and after the appeals therefrom, if any, have been heard by the County Judge, or after the time for appealing has elapsed. If lands in any other municipality than the initiating municipality are assessed for the proposed drain, the by-law cannot properly receive its final reading before the hearing of any appeals

taken by the landowners assessed in such neighbouring municipality, under the provisions of section 62, or by the municipality itself under section 63, or until the time for taking such appeals has elapsed. In a case where the initiating municipality had not waited until such last mentioned period had expired before putting the by-law into force, Wilson J. said: (*re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 543.) "It is extraordinary the township should have finally passed the by-law for the performance of the work until these assessments against the other bodies were finally determined and provided for, and that the work should have been done and paid for before the township knew what sum they could reckon upon, and from whom they were to get their payments. The statute sanctions nothing of the kind, nor is such conduct consistent with ordinary business rules or with plain common sense."

Doing Work and Borrowing Money.

1. For providing for the proposed drainage work ^{Providing for work.} or a portion thereof being done as the case may be.

"For providing for the drainage work being done"

The Act contains no detailed provisions defining the methods and means to be adopted by the initiating municipality in the letting and construction of a drainage work, as e. g. whether the work shall be done by contract, or directly by the municipality itself, and would therefore appear to leave the council free to proceed with the work in such manner as it deems best under the circumstances, without other restrictions than such as are imposed by the necessity of carrying out the work in accordance with the plans and specifications of the engineer, or such as may be provided by its own by-laws.

THE WORK MUST BE EXECUTED IN ACCORDANCE WITH THE ENGINEER'S PLANS.—The drain must be dug by the courses, to the depths, of the capacity, and in other like respects, as laid down on the engineer's plans and specifications adopted by the by-law. (*Smith v. Tp. of Raleigh* [1882] 3 O.R. 405; *Smith v. The State* [1888] 117 Ind. 167; *Lager v. Sibley* [1907] 100 Minn. 85.) In a case (*Racer v. Wingate* [1893] 138 Ind. 114) where the drain had not been constructed in accordance with the plans and specifications as to size, and as to the slope of its banks, and its usefulness was impaired as a result, it was held that the parties assessed were not bound; the Court saying, that it was not necessary that those who are assessed for the cost of a drain should keep constant watch over its construction, but that they had a right to assume up to the time of its completion that it would be constructed in substantial compliance with the plans and specifications. In another case determined by the Courts of the same state (*Cooper v. Shaw* [1897] 148 Ind. 313) it appeared that certain owners had agreed with the surveyor to have the location of the line of the drain across their lands altered from the line laid down on the plan. The Court held that this constituted no valid ground of complaint to landowners whose lands lay above where the change had been made, if their lands received as good drainage in every respect as the drain would have furnished them had it been completed on the line first laid down.

IT IS NOT NECESSARY THAT THE ENGINEER SHOULD SUPERVISE THE CONSTRUCTION OF THE DRAIN.—It was said by Rose J., in *Raney v. Crawley & Tp. of Elma*, (Dec. 13, 1900), and approved on appeal (June 20th, 1901, 2 C. & S. 355, at p. 359). "I see nothing in The Municipal Drainage Act requiring the municipality to employ the surveyor who draws the plans and specifications and makes the report to supervise the work. When he has made his report and it has been adopted and the by-law passed, I see no reason whatever why the municipality should not have the work carried out under the direction of any competent man whom they choose to employ."

And in, *Tp. of Sombra v. Tp. of Chatham* (1891) 18 A.R. 252, at p. 261, Osler J.A., said: "Though he (i.e. the engineer) was appointed commissioner by the by-law to superintend the construction, that was a mere matter of convenience. The council was not bound to appoint him. His legal position was simply that of a servant or agent of the corporation."

If the by-law does not appoint a time within which the work is to be completed, it will be presumed to have intended that it should be completed within a reasonable time. *Smith v. Tp. of Raleigh* (1882) 3 O.R. 405, at p. 410.

PROVISION FOR COMPLETION OF WORK IN CASES WHERE TERRITORY TO BE DRAINED IS ADDED TO ANOTHER MUNICIPALITY DURING PROGRESS OF WORK.—By section 58 (2) and following subsections of the Consolidated Municipal Act, 1903 (3 Edw. VII. (Ch. 19) provision is made for the completion of a drainage work, and for the apportioning and collecting of the assessments, in cases where the lands assessed or some of them have been annexed, during the period of construction or of payment, to some other municipality than that in which the work was initiated.

The following cases deal with the effect of alterations in the limits of the municipalities concerned, upon their drainage indebtedness or upon their liability to pay damages caused by defective drains. *Tp. of Sarnia v. Town of Sarnia* (1882) 1 O.R. 411; *Fairbairn v. Tp. of Sandwich S.* (1899) 2 C. & S. 133; *Wigle v. Tps. of N. and S. Gosfield* (1904) 7 O.L.R. 302.

Borrowing funds.

2. For borrowing on the credit of the municipality, the funds necessary for the work, or the portion to be contributed by the initiating municipality when the same is to be constructed at the expense of two or more municipalities, and for issuing the debentures of the municipality to the requisite amount, including the costs of appeal, if any, and any amount payable in respect of work on railway lands, in sums of not less than \$50 each, and payable within twenty years from date, (except in case of pumping and embanking drainage work, the debentures for which shall be payable within thirty years from their date,) with interest at a rate of not less than 4 per centum per annum.

"For borrowing."

Reference should be made in this connection to sections 384 et seq. of The Consolidated Municipal Act 1903 which regulate the passing of by-laws creating debts.

"The funds necessary."

It was held by a Divisional Court (*Green v. Tp. of Orford* [1888] 15 O.R. 506) that under the circumstances arising in that case, a contractor was entitled to recover for necessary work beyond his contract, in deepening the drain under the supervision of the defendants' engineer, although the contract made no provision for payment for extra work. The Court considered the work in respect to which the claim was made essential to the proper construction of the drain. On appeal, however, the Court of Appeal (decided 16 A.R. 4) that the work in question fell within the terms of the plaintiff's contract and dismissed the action.

"The funds necessary for the work or the portion to be contributed —"

The wording of this subsection was recast in section 52 of the Municipal Amendment Act, 1892, (55 Vic. Ch. 43, sec. 52). The clause "or the proportion to be contributed by the initiating municipality when two or more municipalities" was added on this revision. Upon a construction of this sub-section as it stood previously to this date, it was said by Wilson J. (*re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 544), "I presume it is a matter of detail whether a municipality passes a by-law for raising the whole cost of the work, or only so much of it which such municipality has to pay, and relies upon the payments to be made by the other municipalities for their proportions of it." In a case determined upon the amended sub-section, Rose J., said (*Broughton v. Tp. of Grey et al.* (1895) 26 O.R. 694, at p. 707), "The amendment referred to distinguishes this case from *In re Essex & Rochester*, 42 U.C.R., see p. 544." He also quoted with approval from a judgment of McMahon J. (*Walker v. Tp. of Ellice*, July 14th, 1894), that since the amendment: "the initiating municipality is only authorized to borrow on the credit of the municipality, the proportion to be contributed by it, when the work is to be constructed at the expense of two or more municipalities."

In 1894 the word "proportion" was struck out, and the word "portion" was substituted.

(Further reference may be made to the citations from *Broughton v. Tp. of Grey* [1895] 26 O.R. 694, under section 62 below.)

"Any amount payable in respect of work on railway lands."

This clause was enacted first in the Drainage Act 1894 (57 Vic. Ch. 56, sec. 19 [2]). It came into existence contemporaneously with section 85 of the Act, which authorizes a municipality, upon first obtaining the written consent of the majority of owners interested, to enter into an agreement with a railway company for the construction or enlargement of culverts or other like works necessary to carry the drain and its waters across the railway right of way. A municipality has no authority to assess a railway operating under a charter from the Dominion of Canada, with a share of the cost of a drainage work. (Upon this point see section

85 below and cases cited there.) See also sections 84 and 85 of The Ontario Railway Act 1906 (6 Edw. VII., Ch. 30) incorporated in notes to section 85 below.

"Within twenty years from date."

A similar provision limiting the lifetime of municipal debentures generally is contained in section 384 (4) of The Consolidated Municipal Act 1903. Galt C.J. held in a case (*re Cooke & Village of Norwich* [1889] 18 O.R. 72) determined upon an earlier enactment of that sub-section, that debentures, the time for the repayment of which exceeded this statutory limit, were invalid.

In a case turning upon a section of The Municipal Act, *in pari materia* with the above (see sec. 386 C.M. Act 1903), Falconbridge J. held a by-law authorizing the issue of debentures bad, which fixed the time for their repayment by relation to the date of the completion of the harbour repairs for which they were issued, on the ground that the commencement of the period during which they would be current being contingent and uncertain, their life time might be prolonged beyond the statutory period of twenty years. (*re Armstrong & Tp. of Toronto* [1889] 17 O.R. 766.)

It is not obligatory to register debentures issued under the provisions of this Act, but they may be registered at the option of the municipality. (C.M.A. 1903, sec. 398). If a drainage by-law, authorizing the issue of debentures, is registered, the curative provisions of section 399 of The Consolidated Municipal Act 1903 would apply.

Assessing
lands and
roads.

Assessing Lands and Roads.

3. For assessing and levying, in the same manner as taxes are levied, upon the lands and roads (including roads held by joint stock companies, railway companies, private individuals, counties or county councils) to be benefited by the work and otherwise liable for assessment under this Act in the municipality passing the by-law, a special rate sufficient for the payment of the principal and interest of the debentures, and for so assessing, levying and collecting the same as other taxes are assessed, levied and collected, in proportion as nearly as may be, to their respective liability to contribute.

Fixing time
for paying
assessment.

4. For regulating the times and manner in which the assessments shall be paid.

THE ACQUISITION OF NECESSARY LAND AS PART OF THE COST OF A DRAIN.—While the Act contains no express provision governing the expropriation of such land as may be necessary for the construction of a drain, the value of such lands taken as have an independent value apart from the benefit which they will receive from the drain should be allowed to their owners. It is proper, therefore, in cases where the acquisition of such lands is

necessary, that the cost of expropriating such lands should be reckoned and assessed as part of the cost of the proposed work.

"To be benefited."

A statement in a by-law and in a schedule thereto to the effect that the parties assessed were the parties benefited has been accepted as *prima facie* evidence of the fact that the lands so assessed were assessed as the only lands within the municipality regarded as benefited by the proposed work. (*re Montgomery & Tp. of Raleigh* [1871] 21 U.C.C.P. 381, at p. 393.) This case was subsequently considered and explained by Hagarty C.J.O., in *re Robertson & Tp. of N. Easthope* (1889) 16 A.R. 214, at p. 217, and also considered without disapproval by Osler J.A., in *Tp. of Warwick v. Tp. of Brooke* (1901) 1 O.L.R. 433, at p. 442.

(As to what results are included under the term "benefit" reference may be made to notes to sec. 3(1) above.)

"A special rate sufficient—"

If the amount assessed does not prove sufficient to complete the drain, the municipality may amend the by-law as provided by section 66 of the Act and issue additional debentures to make up the deficiency. The same section makes provision for the distribution of any surplus remaining in a case where the assessment is more than sufficient to complete the work.

The by-law may set out the extent to which the individual assessed owners shall be liable to keep the drain clear of obstructions after its construction, and provide that on default being made, after notice, the cost of removing such obstructions may be levied against the lands of the party making default. Sections 77a and 10a.

Determining Assessment Liability.

5. For determining what lands and roads will be benefited by or otherwise rendered liable for assessment for the drainage work, and the proportion in which the assessment should be made, subject in every case of complaint by the owner or any person interested in any lands or roads to appeal as hereinafter provided. R.S.O. 1897, c. 226, s. 19.

Determining property to be benefited.

"For determining."

Gwynne J., in *re Montgomery & Tp. of Raleigh* (1871) (21 U.C.C.P. 381) said, p. 390: "It certainly appears difficult to understand what was the object and intent of the Legislature in enacting that the council of a municipality, contemplating the passing of a by-law for draining a locality should in that by-law provide for ascertaining and determining, through the engineer, what property would be benefited, and the proportions in which the assessment should be borne by the lands benefited; for the whole scope and object of the Act would seem necessarily to require that these are matters which should be ascertained and determined before any by-law is passed authorizing the commencement of the work."

MUNICIPAL DRAINAGE ACT.

Form of
By-law

FORM OF BY-LAW.

20. The by-law shall, varying with the circumstances, be in the form or to the effect of the form given in Schedule B. to this Act. R.S.O. 1897, c. 226, s. 20.

SCHEDULE B.

FORM OF BY-LAW.

(Section 20).

A by-law to provide for drainage work in the of in the county of and for borrowing on the credit of the municipality, the sum of for completing the same (or the sum of the proportion to be contributed by said municipality for completing the same).

Provisionally adopted the day of A.D. 189—. Whereas the majority in number of the resident and non-resident owners (exclusive of farmers' sons not actual owners), as shown by the last revised assessment roll, of the property hereinafter set forth to be benefited by drainage work (as the case may be) have petitioned the council of the said of praying that (here set out the purport of the petition, describing generally the lands and roads to be benefited).

And whereas thereupon the said council has procured an examination, to be made by , being a person competent for such purpose, of the said area proposed to be drained and the means suggested for the drainage thereof, and of other lands and roads liable to assessment under *The Municipal Drainage Act*, and has also procured plans, specifications and estimates of the drainage work to be made by the said and an assessment to be made by him of the lands and roads to be benefited by such drainage work, and of other lands and roads liable for contribution, thereto, stating as nearly as he can the proportion of benefit, outlet liability and injuring liability, which in his opinion will be derived or incurred in consequence of such drainage work by every road and lot, or portion of lot, the said assessment so made being the assessment hereinafter by this by-law enacted to be assessed and levied upon the roads and lots, or parts of lots hereinafter in that behalf specially set forth and described; and the report of the said in respect thereof, and of the said drainage work being as follows: (here set out the report of the engineer or surveyor employed.)

And whereas the said council are of opinion that the drainage of the area described is desirable:—

Therefore the said municipal council of the said of , pursuant to the provisions of *The Municipal Drainage Act*, enacts as follows:—

1st. The said report, plans, specifications, assessments and estimates are hereby adopted, and the drainage work as therein indicated and set forth shall be made and constructed in accordance therewith.

2nd. The reeve (or mayor) of the said may borrow on the credit of the corporation of the said of the sum of dollars, being the funds necessary for the work not otherwise provided for (or being said municipality's proportion of the funds necessary for the work), and may issue debentures of the corporation to that amount in sums of not less

FORM OF BY-LAW.

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than \$50. each and payable within _____ years from the date of the said debentures, with interest at the rate of _____ per centum per annum, that is to say : (insert the manner of payment annually and whether with or without coupons, and if the latter, omit the last clause of this paragraph) such debentures to be payable at _____, and to have attached to them coupons for the payment of interest.

3rd. For paying the sum of (\$410), the amount charged against the said lands and roads for benefit, and the sum of (\$108), the amount charged against said land and roads for outlet liability and the sum of (\$135), the amount charged against said lands and roads for injuring liability, apart from lands and roads belonging to or controlled by the municipality, and for covering interest thereon for _____ years, at the rate of _____ per centum per annum, the following total special rates over and above all other rates shall be assessed, levied and collected (in the same manner and at the same time as other taxes are levied and collected) upon and from the undermentioned lots and parts of lots and roads, and the amount of the said total special rates and interest against each lot or part of lot respectively shall be divided into _____ equal parts, and one such part shall be assessed, levied and collected as aforesaid, in each year, for _____ years, after the final passing of this by-law, during which the said debentures have to run.

Concession.	Lot or part of lot.	Acres.	Value of benefit.	Value of outlet liability.	Value of injuring liability.	To cover interest for years at per cent.	Total special rate.	Annual assessment during each year for years.
10	S. 10	200	\$ 100 00	\$ 23 00	\$ 00	\$ 00	\$ 00	\$ 00
10	S. 10	100	50 00	10 00				
10	S. 10	50	30 00	5 00				
10	S. 10	100	80 00	13 00				
10	S. 10	150	150 00	20 00				
10	S. 10	200	.....	24 00				
10	S. 10	100	.....	13 00				
9	S. 10	100	.....		40 00			
9	S. 10	50	.....		25 00			
9	S. 10	150	.....		70 00			
Total for benefit.....			410 00	108 00	135 00			
" outlet.....			108 00					
" injuring.....			135 00					
Roads (and lands) of municipality.....			100 00					
Total.....			5753 00					

4th. For paying the sum of (\$100), the amount assessed against the said roads and lands of the municipality, and for covering interest thereon for _____ years at the rate of _____ per centum per annum, a special rate on the dollar sufficient to produce the required yearly amount therefor, shall, over and above all other rates, be levied and collected (in the same manner and at the same time as other taxes are levied and collected) upon and from the whole rateable property in the said _____ of _____ in each year for _____ years, after the final passing of this by-law, during which the said debentures have to run.

5th. This by-law shall be published once in every week for four consecutive weeks in the _____ newspaper, published in the town of _____ (or printed and served or mailed as described), and shall come into force upon and after the final passing thereof, and may be cited as the _____ By-law."

R.S.O. 1897, C. 226, s. 20; 6 Edw. VII. Ch. 37, sec. 4.

In 1906 the second paragraph of the draft by-law was amended by the insertion of the phrase "of the said debentures" in place of the word "thereof," after the word "date" in the seventh line. This Amendment was apparently intended to distinguish more clearly and to prevent in future the litigating of the narrow point decided in *re Cooke & Village of Norwich* (1889) 18 O.R. 72; *re Armstrong & Tp. of Toronto* (1889) 17 O.R. 766.

In *re Montgomery & Tp. of Raleigh* (1871) 21 U.C.C.P. 381, Judge Gwynne, referring to the recital in the above draft by-law which states that a majority in number of the owners whose lands will be benefited have petitioned, said, (p. 394): "In the absence of all suggestion of fraud, and of all opposition to the by-law when before the council upon the ground taken, I think that a by-law which recites that a sufficient number have petitioned should be taken as true, unless at least the recital be clearly established to be glaringly untrue, so as to afford a presumption of fraud in the proceedings of the council."

Publication of
by-law and
notice of sit-
ting of Court
of Revision.

PUBLICATION OF BY-LAW.

21. (1) Before the final passing of the by-law, it shall be published once in every week for four consecutive weeks in such newspaper published either within the municipality or in the county town, or in a newspaper published in an adjoining or neighbouring municipality, as the council may by resolution designate, with a notice of the time and place of holding the Court of Revision, and also a notice that anyone intending to apply to have the by-law or any part thereof quashed, must, not later than ten days after the final passing thereof, serve a notice in writing upon the reeve or other head officer and the clerk of the municipality, of his intention to make application for that purpose to the Drainage Referee during the six weeks next ensuing the final passing of the by-law.

(2) The clerk shall furnish the publisher of the newspaper with the names and post office addresses of all persons within the municipality whose lands are assessed for the drainage work, and the publisher shall mail or cause to be mailed to each owner, to such post office address, the first two issues of the newspaper, containing the by-law, and the publisher or person mailing such newspapers shall make a statutory declaration of such mailing, and file the same with the clerk of the municipality publishing the by-law. R.S.O. 1897, c. 226, s. 21; Amended by 7 Edw. VII. Ch. 42, sec. 2.

Newspaper to be sent to each person assessed

INTRODUCTORY.—A reference to the following statutes will show the development of this section into its present form. By The Municipal Amendment Act 1879, (42 Vic. Ch. 31, sec. 27), the phraseology of this section was settled substantially in its present form. The Municipal Amendment Act 1892, 55 Vic. Ch. 43, sec. 55, added the words "or neighbouring" after "adjoining," probably as a result of the decision in *Huson v. Tp. of S. Norwich* (1893) 21 S.C.R. 669, then before the Courts, and to prevent in future the litigating of the narrow point raised in that case. In the section of the Drainage Act 1894 corresponding with the above section (57 Vic. Ch. 56, sec. 21(1)), the provision requiring notice of the time and place of holding the court of revision to be published along with the by-law was first inserted in this connection. Previously to this date, the law upon this head had been embodied in the various sections from time to time in force corresponding with section 33 of the present Act. A similar provision is still made in this section, see sec. 33 below.

"Before the final passing of the by-law."

The by-law cannot properly be finally passed until after the sittings of the Court of Revision have been held, and until any appeals therefrom have been determined or the time for appealing has elapsed. See remarks of Wilson J. in, *re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 543, cited ante under section 19; *re Dundas Street Bridges* (1904) 8 O.L.R. 52 at p. 58. Any changes in assessments made by the Court of Revision, or by the County Judge, on appeal therefrom, are to be entered on the schedule to the by-law, and it is to be finally passed as amended, (sec. 52). Such changes do not necessitate a new publication of the by-law. (*re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325, at p. 332).

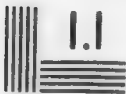
"It shall be published."

PUBLICATION REQUIRED AND CONSEQUENCES OF DEFECTIVE PUBLICATION.—The object of publication is to give notice to all interested owners. A failure to publish, or to publish in the manner set forth in this section would leave the by-law open to successful attack on a motion to quash. (*re Ostrom & Tp. of Sidney* (1888) 15 A.R. 372; *re Mace & County of Frontenac* (1877) 42 U.C.Q.B. 70; *re Pickett & Tp. of Wainfleet* (1897) 28 O.R. 464, at p. 466.)



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It was, however, held by Cameron J. (*re White & Tp. of E. Sandwich* (1882) 1 O.R. 530), that a failure to post up copies of a drainage by-law, as was required by the Act then in force, was not an objection that should be given effect to, where the applicant had independent knowledge of the contents of the by-law, and had taken action thereon.

"Once in every week."

A Divisional Court has recently construed a similar provision of the Municipal Act to mean once in each of the successive periods of seven days beginning with the day of the first publication and counting forward, and not once in each of the successive calendar or biblical weeks reckoned from the Sunday immediately preceding the day of the first publication. And a publication which fulfilled the latter requirement but not the former was held bad, and the by-law based upon it was quashed. (*re Rickey & Tp. of Marlborough* (1907) 14 O.L.R. 587, 9 O.W.R. 930).

"For four consecutive weeks."

It has generally been held that a failure to publish the proposed by-law the full number of times required by statute is a fatal objection to the validity of the by-law. (*re Cartwright & Town of Napanee* (1905) 11 O.L.R. 69, at p. 71; *re Mace & County of Frontenac* (1877) 42 U.C.Q.B. 70).

The late Sir John Beverley Robinson C.J., however, in a case (*re Boulton & Town of Peterborough* (1857) 16 U.C.Q.B. 380, at p. 387), where the by-law had been published only three times instead of four in one of the two newspapers in which it was inserted, exercised his discretion in refusing to quash on this ground, and left the applicant to his remedy by action. It will be noted that in this case the publication in the other newspaper was in compliance with the requirements of the statute, and that money had already been borrowed under the by-law. See also judgment of a Divisional Court in *re Robinson & Village of Beamsville* (1907) 9 O.W.R. 317, where the above decision is cited with approval.

"In an adjoining or neighbouring municipality."

The words "or neighbouring" were added in 1892 by 55 Vic. Ch. 43, sec. 55. The Supreme Court held in *Huson v. Tp. of S. Norwich* (1893) (21 S.C.R. 669) upon the wording of this phrase as it stood before the above amendment, that adjoining did not mean that the boundaries of the municipality in which the by-law was published should necessarily touch those of the municipality initiating the by-law. Strong C.J., who delivered the judgment of the Court, said, p. 672: "Now what the Legislature had in view in requiring publication in a newspaper published in an adjoining municipality was to ensure the insertion of the advertisement in a paper published in the near neighbourhood of the municipality whose ratepayers were to be called on to vote"

"Is the council may by resolution designate."

It was recently determined by Magee J., whose judgment was subsequently affirmed by a Divisional Court (*re Dillon & Village of Cardinal* (1905) 10 O.L.R. 371, at p. 373) that the resolution determining in what newspaper the by-law shall be published may be a general resolution of council passed at some previous date, that all municipal printing shall be done by a certain named newspaper.

With a notice of the Court of Revision."

See also section 33 of the Act, which contains a similar provision.

The Court of Revision must hold its first sitting at some date not earlier than twenty nor later than thirty days from the date of the first publication of the by-law (sec. 33). Some legal day within this limited time must therefore be selected and inserted in the notice. Failure to publish or serve this notice, along with the by-law is a fatal objection if taken advantage of on an application to quash the by-law. Wilson C.J., in his judgment in, *re Ferguson & Tp. of Howick* (1879) (44 U.C.Q.B. 41) said, (p. 47) : "The absence of this notice is more material, because its purpose is to fix a day when the Court of Revision will be held, in order that the parties affected by the by-law may appear and make their complaints against their assessments." And at p. 48 : "The want of a notice both to the published and posted by-law, as to the time and place of the meeting of the Court of Revision is a serious objection, which cannot, I think, be cured by the isolated notice to that effect printed in the newspaper."

"Also a notice that any one intending to have the by-law quashed."

Failure to publish such a notice or the publication of an incomplete or defective notice under this provision does not affect the validity of the by-law, but merely leaves to a ratepayer the full statutory period of one year from the passing of the by-law (C.M.A. 1903, sec. 379) within which he may make his application to quash, instead of the shorter period to which he is limited by this section where the notice has been published. (*re Ferguson & Tp. of Howick* (1879) 44 U.C.Q.B. 41, at p. 47; *re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325; *Broughton v. Tp. of Grey* (1895) 26 O.R. 694, at p. 704).

The applicants are not to be prejudiced, if they have followed the notice to intending applicants published by the council, because that notice is incorrect or defective. The council must be held to their own notice. (Per Street J., *re Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423, at p. 430, not overturned on this point on appeal, 16 A.R. 214).

"Not later than ten days."

The Courts in construing definite limitations of time fixed by municipal statutes for the taking of certain proceedings have generally held that they are not empowered to afford relief where proceedings have not been commenced within the prescribed period. (*re Sweetman & Tp. of Gosfield* (1889) 13 Pr. R. 293, at p. 294; *re Henderson & Tp. of Mono* (1907) 9 O.W.R. 599).

"Serve a notice in writing."

STEPS TO BE TAKEN IN MOVING TO QUASH A BY-LAW.— It will be noted that two copies of this notice of intention to move to quash should be served, one upon the head officer of the municipality and the other on the clerk. This notice will ordinarily be given prior to the service of the notice of motion by which the application is commenced, as the notice of motion cannot properly be served until the affidavits to be used on the motion have been first filed. (Rule 524, Consolidated Rules of Practice). The required notice must be given whether the proposed work be

one of original construction or one of repair and improvement. (*re McCormick & Tp. of Howard* (1889) 18 O.R. 260.)

"Of his intention."

It has been held that the notice must be given by, or on behalf, of a named party who subsequently makes application to the Court; that an applicant can not avail himself of a notice given by another who does not join in the proceedings, nor of a notice purporting to be given on behalf of certain named persons (of whom he is not one) "and others." (*re McCormick & Tp. of Howard* (1889) 18 O.R. 260). The late Mr. Justice Street, in delivering judgment upon the above application, said, p. 263: "Under the statute the council are entitled to know who is the person objecting to the by-law, and a notice which does not give this information is not sufficient under the statute."

"To make application."

Applications to quash by-laws must now be made by motion, and cannot now be made by rule *nisi*. (Rule 356, C.R. of Practice; *re Cokenutt & Tp. of Colchester N.* (1889) 13 P.R. 253; *re Shaw & City of St. Thomas* (1889) 18 P.R. 454, at p. 456.)

"To the Drainage Referee."

By the amending Act of 1907 (7 Edw. VII. Ch. 42, sec. 2) these words were inserted in the place of the phrase "High Court of Justice." The continuance of the latter phrase was clearly an anomaly as since the re-enactment of section 93(1) of the Act in 1901 (1 Edw. VII. Ch. 30, sec. 4) all such applications are to be heard by a referee only. See also section 89 (3) of the Act.

"During the six weeks next ensuing"

The late Mr. Justice Street in a case (*re Sweetman & Tp. of Gosfield* [1889], 13 P.R. 293) which turned upon a construction of this requirement, held that where the notice of motion to quash was served on the last day of the six weeks, but the motion was not brought on for hearing until after the time limited had expired, the applicant was entitled to proceed, saying (p. 297): "The summary proceeding of a motion to the Court, whether it be to set aside an award or to quash a by-law, stands in the place of an action brought for the same purpose, and the service of a notice of motion is as clearly the commencement of the one proceeding as the issue of a writ of summons is of the other." And at p. 298, "The Court possesses sufficient power to frustrate any attempt to tie up for an unreasonable time the argument of the question of the validity of a by-law, should the motion be fixed by the notice of an unreasonably long date." This judgment was subsequently approved of by the Court of Appeal, (*re Shaw & City of St. Thomas* [1899] 18 P.R. 454) in which case that Court held upon a corresponding provision of the Municipal Act, that an application to quash is made when the affidavits in support have been filed and the notice of motion served, and that it was not necessary that the motion itself should be heard within the prescribed period. (See also *Byrne v. Tp. of N. Dorchester* [1902] 2 C. & S. 318.)

The procedure to be adopted by a ratepayer moving to quash a municipal by-law is set out in section 378 of the Consolidated Municipal Act 1903 (3 Edw. VII. Ch. 19). Seven days notice of the application must be given the municipality whose by-law

is attacked. It was held by the late Mr. Justice Street (*re Sweetman & Tp. of Gosfield* (1889) (13 P.R. 293) that the Court had no power to shorten the time fixed by the Municipal Act for serving the notice of motion.

"For that purpose."

The object of the Legislature in establishing a summary method of determining by motion the validity of municipal by-laws, and the effect that should be given to the provisions of The Municipal Act in that behalf, cannot be enunciated better than by citing from the judgment of Meredith J., in, *re Cartwright & Town of Napanee* (1905) 11 O.L.R. 69, at p. 70: "The purpose of the legislation is very plain—to provide a prompt, simple and inexpensive means of getting rid of any invalid by-law; to save the obvious inconvenience, and sometimes great loss, arising from want of such means. In cases in which there is no good reason why the validity of a by-law should not be tested before it is acted upon, instead of waiting until, it may be, extensive and expensive operations have been carried on under it, the legislation creates jurisdiction of a highly convenient and remedial character, and so one which ought to be exercised in every case to which its benefits are applicable; in other words the jurisdiction ought, generally speaking, to be exercised in every case of an illegal by-law which cannot be validated. It would be against the interests of those who support the by-law, as well as of all others, to permit it to stand if incurably bad. In a case of an invalid by-law which can be cured, again generally speaking, the jurisdiction ought to be exercised when the irregularities which render it invalid affected, or might have affected the passing of it; but ought not to be exercised when they could not." (See also *re Huson & Tp. of S. Norwich* [1892] 19 A.R. 343, at p. 350, cited above, to the same effect.)

WHAT ARE SUFFICIENT GROUNDS FOR QUASHING DRAINAGE BY-LAWS.—The following statutory requirements have been held by the Courts to be essential to vest jurisdiction in a municipality to pass a drainage by-law under the provisions of this Act, and if the proceedings have not complied with any one or more of the following provisions that sufficient grounds for quashing such by-law, or for treating it as invalid in an independent action, exist.

INSUFFICIENT PETITION.—If the petitioners do not make up the required majority of duly qualified owners ascertained in the manner defined by section 3 (1), the work is not within the protection of the Act. (*re Montgomery & Tp. of Raleigh* [1871] 21 U.C.C.P. 381; *re Misener & Tp. of Wainfleet* (1882) 46 U.C.Q.B. 457; *re White & Tp. of E. Sandwich* (1882) 1 O.R. 530; *Tp. of Chatham v. Tp. of Dover* (1886) 12 S.C.R. 321; *Tp. of W. Nisour v. Tp. of N. Dorchester* (1887) 14 O.R. 294; *re Robertson & Tp. of N. Easthope* (1889) 16 A.R. 214; *re Tp. of Anderdon & Tp. of N. Colchester* (1891) 21 O.R. 476; *Tp. of Warwick v. Tp. of Brooke* (1901) 1 O.L.R. 433, at p. 443; *re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 471; *re Sweetman & Tp. of Gosfield* (1889) 13 P.R. 293, at p. 298.)

The last revised assessment roll in force at the time the drainage scheme was initiated will be looked at to determine the status of a petitioner, and no evidence will be received to contradict it. (*Tp. of Warwick v. Tp. of Brooke* (1901) 1 O.L.R. 433; *Challoner v. Tp. of Lobo* (1901) 1 O.L.R. 156, 32 S.C.R. 505.)

A recital in a by-law which states that a majority of owners affected have petitioned has been held prima facie evidence of that fact. (*re Monigomery v. Tp. of Raleigh* (1871) 21 U.C.C.P. 381, at p. 394; *re Robertson v. Tp. of N. Easthope* (1889) 16 A.R. 214, at p. 217.)

INSUFFICIENT DESCRIPTION OF LANDS AFFECTED.—A petition which does not define the lands to be affected by the proposed drain sufficiently to enable one to locate them is not a proper petition. (*re Tp. of Romney & Tp. of Mersea* (1885) 11 A.R. 712, at p. 722; *Tp. of Malahide v. Tp. of Dereham* (1895) 1 C. & S. 243; *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495, at p. 513.) And unexplained interlineations and alterations in a petition are to be considered in quashing a drainage by-law. (*re Cassidy & Tp. of Mountain* (1897) 17 C.L.T. Occ. N. 417.)

But a strong presumption that the petition is sufficient will arise, if objection is not made until the work has been undertaken and the money spent. (*Gibson & Tp. of N. Easthope* (1894) 21 A.R. 504, at p. 515, aff. 24 S.C.R. 707.)

ABSENCE OF A PETITION IS A FATAL DEFECT.—If a drainage work purporting to be authorized by the Act is initiated without a petition, or without a petition for the construction of the work actually undertaken, the whole undertaking is irregular and open to attack either on motion to quash or in an independent action. (*re Misener & Tp. of Wainfleet* (1881) 46 U.C.Q.B. 457; *Tp. of Chatham v. Tp. of Dover* (1886) 12 S.C.R. 321, at p. 338; *re Tp. of Anderdon & Tp. of Colchester N.* (1891) 21 O.R. 476; *re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417; *re McDonald & Village of Alexandria* (1903) 2 O.W.R. 637; *re Tp. of Aldborough & Tp. of Dunwich* (1904) 4 O.W.R. 159, at p. 160; *re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 471, at p. 477.)

ASSESSMENTS MADE UPON A MISTAKEN CONSTRUCTION OF THE ACT.—Assessments levied under a drainage by-law upon lands which cannot from their situation receive any benefit from the proposed drain, or upon lands which are already sufficiently drained by the natural lay of the land, or by existing drains, are not authorized by the Act. If the assessments have been made upon a mistaken principle or if the improper assessments are so numerous as to vitiate the whole scheme the proposed by-law will be set aside. (*Re Tp. of Harwich & Tp. of Raleigh* (1890) 20 O.R. 154, at p. 156; *Tp. of S. Gosfield v. Tp. of N. Gosfield* (1897) 1 C. & S. 342, at p. 344; *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495; *re Tp. of Elma & Tp. of Wallace* (1903) 2 O.W.R. 198; *re Tp. of Aldborough & Tp. of Dunwich* (1904) 4 O.W.R. 159; *The People v. Jefferson County Court* (1867) 56 Barb. N.Y. 136, at p. 147; *Blue v. Wents* (1896) 54 Ohio R. 247; *Beals v. James* (1899) 173 Mass. 591)

Nor can a drainage by-law be supported if the cost of the proposed work exceeds the benefit measured by increased productiveness and sale value that will accrue to the lands assessed. (*Tp. of S. Gosfield v. Tp. of Mersea* (1895) 1 C. & S. 268, at p. 270; *Tp. of Raleigh v. Tp. of Harwich* (1897) 1 C. & S. 348; *Trinito v. Beaver* (1900) 155 Ind. 652). Assessments which are levied for benefit of a kind that is not within the object of the Act, as the increased healthfulness that will result, or upon a basis or principle not sanctioned by the Act will be set aside or the by-law quashed.

(Tp. of Dover v. Tp. of Chatham (1886) 12 S.C.R. 321, at p. 364; Tp. of Stephen v. Tp. of McGillivray (1891) 18 A.R. 516, at p. 524; Woodruff v. Fisher (1853) 17 Barb. N.Y. 224, at p. 231; Skinkle v. Tp. of Clinton (1877) 39 N.J.L.R. 656.)

ASSESSMENTS NOT CLASSIFIED.—If the engineer has not in his report classified his assessments upon the principles laid down by the Act, shewing whether they are respectively levied for benefit, for outlet or for injuring liability, and it appears that one or more elements of the joint or unclassified assessments are not justified, the report must be set aside. (*Re Tp. of Orford & Tp. of Howard (1891) 18 A.R. 496, at p. 501; Tp. of Stephen v. Tp. of McGillivray (1891) 18 A.R. 516, at p. 528.*)

EXTENT OF BENEFIT IS A QUESTION FOR THE COURT OF REVISION.—But if the lands in question are so situate that they may be benefited by the construction of the drain, and the question to be determined is to what extent will they be benefited, this is the exclusive province of the Court of Revision and of the County Court Judge on appeal therefrom, and the by-law is therefore not open to attack before the Referee because of over assessment or under assessment of certain lands. (*Re Montgomery & Tp. of Raleigh (1871) 21 U.C.C.P. 381, at p. 393; re McLean & Tp. of Ops (1880) 45 U.C.Q.B. 325; While v. Tp. of E. Sandwich (1882) 1 O.R. 530; re Stephens & Tp. of Moore (1894) 25 O.R. 600; Tp. of Ellice v. Hiles (1894) 23 S.C.R. 429, at p. 444; Tp. of Rochester & Tp. of Mersea (1899) 26 A.R. 474, at p. 481; Wabash Eastern Ry. v. Commrs. Lake Fork Drainage Dist. (1890) 134 Ill. 384; Blake v. The People (1884) 109 Ill. 504; Alstad v. Sim (1906) 109 N.W.R. 66.*) A party or municipality by appealing against its assessment is not thereby precluded from afterwards objecting upon sufficient grounds to the legality of the drainage scheme in an action based upon it. (*Tp. of Stephen v. Tp. of McGillivray (1891) 18 A.R. 516.*)

THE OBJECT SOUGHT TO BE ACCOMPLISHED MUST BE SUCH AS IS CONTEMPLATED BY THE ACT.—A valid drainage by-law must have for its primary object the draining of the assessed lands, and not some other independent object as to which any improved drainage which will result is a mere incident. And it has been said that the Act does not authorize the construction of a drain in the first instance for purposes of outlet as distinguished from benefit. (*Woodruff v. Fisher (1853) 17 Barb. N.Y. 224, at p. 231; Scruggs v. Reese (1891) 128 Ind. 400; Tp. of Stephen v. Tp. of McGillivray (1891) 18 A.R. 516, at p. 525; re Tp. of Orford & Tp. of Howard (1891) 18 A.R. 496, at p. 499.*)

UNDER WHAT CIRCUMSTANCES AN ENGINEER'S REPORT IS INVALID.—If an engineer's report is defective in any of the following respects, the by-law based upon it will be quashed or set aside. If the engineer did not take the required oath of office before entering on his duties. (*Re Burnett & Tp. of Durham (1899) 31 O.R. 262; Tp. of Colchester N. v. Tp. of Gosfield N. (1900) 27 A.R. 281.*) Or if he did not personally examine the lands to be drained before striking the assessments. (*Tp. of Elizabethtown v. Tp. of Augusta (1901) 2 O.L.R. 4, at p. 13, per Moss J.A., approved 32 S.C.R. 295, at p. 304; Swamp Land Dist. No. 307 v. Gwynn (1886) 70 Cal. 566, at p. 568; People v. Hagar (1877) 52 Cal. 171; People v. Ahern (1877) 52 Cal. 208.*) If the assessments were not calculated from

information procured by the engineer in person or under his immediate supervision. (*Re Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423, at p. 431; 10 A.R. 214; *re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399, at pp. 404 & 406; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at p. 420; *Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4, at pp. 13 & 17.) But not because the engineer did not make his assessments on the ground, (*Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4, at p. 13, 32 S.C.R. 295, at p. 304), or personally work out the details of the assessments from the material he had collected. (*Re Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423.)

Unless the report specifies the lands assessed, and distributes the total assessment upon the several lots or parts of lots to be benefited it is invalid. (*Re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 547; *Tp. of Thuring v. Tp. of Sidney* (1882) 1 O.R. 249, at p. 258; *re Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423, at p. 430; *re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399; *Tp. of Warwick v. Tp. of Brooke*, 1900, 2 C. & S. 243; *Zigler v. Menges* (1889) 121 Ind. 99.) But a patent mistake in an assessment which can cause no possible injury will not support an attack. (*Smith v. The State* (1893) 8 Ind. App. 661.) Nor the fact that the engineer amended his report by distributing certain assessments among the fractional parts of certain lots, the parties affected being present and receiving notice, and the by-law being subsequently passed in accordance therewith. (*Challoner v. Tp. of Lobo* (1901) 1 O.L.R. 156, at p. 159.)

It is essential that the assessments should be the result of the engineer's independent judgment, without interference from the council or other source. (*Re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417.) But by merely referring back his report to him for amendment, the council do not infringe upon this rule. (*Williams v. Tp. of Raleigh*, 1893, A.C. 540, at p. 550.) And in such a case it is not necessary that the engineer should make a new examination and assessment, if his former examination has supplied him with all requisite information (*Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4, 32 S.C.R. 295). If the engineer has founded his report upon incorrect information or a misconception of material facts, it should be set aside. (*Re Stonehouse & Tp. of Plympton* (1896) 27 O.R. 541, 24 A.R. 416.)

FAILURE TO INCORPORATE ALTERATIONS IN ASSESSMENTS MADE BY COURT OF REVISION.—If certain assessments have been altered by the Court of Revision, or on appeal therefrom, and the by-law has been finally passed without incorporating these alterations in its assessment schedules, and it is impossible as a result to ascertain the amount to be annually levied against a particular parcel of land, the by-law will be set aside. (*County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 543; *re Funtson & Tp. of E. Tilbury* (1885) 11 O.R. 74.) But such alterations do not necessitate a re-publication of the by-law. (*Re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325, at p. 332.)

If such a length of time has elapsed between the initiation of the work and the filing of the engineer's report that material changes in the ownership of the lands to be drained, and in the conditions affecting the necessity for or desirability of the proposed work have taken place it should not be allowed to stand. (*Re McNamee & Tp. of Osgoode* (1906) 13 O.L.R. 472, at p. 474.) Apparently

if the engineer is not a disinterested party. (*Markley v. Rudy* (1888) 115 Ind. 533.) But it has been held that a member of a Court of Revision is not disqualified by reason of the fact that he is a ratepayer in the locality to be drained. (*Re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325, at p. 335.) And the fact that the engineer was not present at a meeting of the Court of Revision has been held an insufficient reason for quashing a by-law, where his absence occasioned no injury to the applicants. (*Re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325.)

INSUFFICIENT OUTLET.—Unless the drain is carried to a proper outlet the Court will not sustain the by-law, except in cases where the owners of low lying lands at its mouth are compensated under the provisions of section 9(10) of the Act. (*Northwood v. Tp. of Raleigh* (1882) 3 O.R. 347, at p. 358; *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 445; *Chapel v. Smith* (1890) 80 Mich. 100; *Tp. of Euphemia v. Tp. of Brooke* (1898) 1 C. & S. 358, at p. 359; *re Tp. of Raleigh & Tp. of Harwich* (1899) 26 A.R. 313, at p. 318; *Bruggink v. Thomas* (1900) 125 Mich. 9; *Wigle v. Tps. N. & S. Gosfield* (1902) 2 C. & S. 186 (1904) 7 O.L.R. 302; *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, at p. 452.)

LACK OF SUFFICIENT PUBLICATION.—A by-law which has not been published the number of times, for the length of time, or at the intervals fixed by statute is open to attack. (*Re Ostrom & Tp. of Sidney* (1888) 15 A.R. 372; *re Mace & County of Frontenac* (1877) 42 U.C.Q.B. 70; *re Pickett & Tp. of Wainfleet* (1897) 28 O.R. 464; *re Cartwright & Town of Napanee* (1905) 11 O.L.R. 69, at p. 71; *re Rickey & Tp. of Marlborough* (1907) 14 O.L.R. 587.) And failure to publish a notice of the time and place of holding the first meeting of the Court of Revision will invalidate the by-law if anyone has been prejudiced thereby. (*Re Ferguson & Tp. of Howick* (1879) 44 U.C.Q.B. 41.) But an omission to publish the notice calling upon parties intending to move to quash to do so within the prescribed time will not have this effect. (*Re Ferguson & Tp. of Howick* (1879) 44 U.C.Q.B. 41, at p. 47; *re Broughton & Tp. of Grey* (1895) 26 O.R. 694, at p. 704.)

NO NOTICE OF ASSESSMENT.—If a party assessed is given no notice of his assessment, or if he receives no notice of the proposed by-law as required by sections 21 and 22 of the Act, he is not bound thereby, except so far as he may have received notice aliunde or may have estopped himself by his conduct from taking advantage of the failure to notify him. (*Re Stephens & Tp. of Moore* (1894) 25 O.R. 600, at p. 604; *Wright v. Wilson* (1883) 95 Ind. 408; *re McCrae & Village of Brussels* (1904) 8 O.L.R. 156; *re Hodgins & City of Toronto* (1896) 23 A.R. 80, at p. 83.) It has been held that a by-law would not be quashed on this ground where the applicants had knowledge from external sources and had acted upon such knowledge. (*Re White & Tp. of E. Sandwich* (1882) 1 O.R. 530.) An owner who has not put his title on record cannot complain of lack of notice. (*Bell v. Cox* (1889) 122 Ind. 153.)

UNAUTHORIZED ALTERATIONS FROM THE SCHEME PETITIONED FOR.—The following variations in the construction of a drain from the scheme sanctioned by a majority of the assessed owners, and set out in the engineer's report have been held sufficient grounds for quashing the by-law or declaring it invalid. If the length, capacity or course of the drain has been materially altered. (*Re*

Misener & Tp. of Wainfleet (1882) 46 U.C.Q.B. 457; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417; *re McDonald & Village of Alexandria* (1903) 2 O.W.R. 637; *re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 471; *Priest v. Tp. of Flos* (1901) 1 O.L.R. 78, at p. 85; *Smith v. The State* (1888) 117 Ind. 167; *Racer v. Wingate* (1893) 138 Ind. 114.) But minor alterations, the necessity for which becomes apparent during the progress of the work, and which do not affect the general character of the work are allowable. (*Re Suskey & Tp. of Romney* (1892) 22 O.R. 664; *Lager v. Sibley* (1907) 100 Minn. 85.) And it has been held that a change in the course of a portion of the drain, which did not affect or injure the parties complaining, could not be taken advantage of by them. (*Cooper v. Shaw* (1897) 148 Ind. 313.)

It is not essential that the engineer who has drawn the report and plans should supervise the construction of the drain. (*Tp. of Sombra v. Tp. of Chatham* (1891) 18 A. R. 252; per Osler J. A. at p. 261. *re Raney v. Crawley & Tp. of Elma* (1901) 2 C. & S. 355, at p. 359.)

WHERE NO PROVISION IS MADE FOR MAINTENANCE.—A drainage by-law which does not make provision for the maintenance of the drain, or which makes provision in that behalf in conflict with the terms of the Act is invalid. (*Re Clark & Tp. of Howard* (1885) 9 O.R. 576; *re Clark & Tp. of Howard* (1888) 14 O.R. 598, 16 A.R. 72, at p. 85; *re Tp. of Mersea & Tp. of Rochester* (1895) 22 A.R. 110, at p. 122; *Tp. of Dover v. Tp. of Chatham* (1904) 3 O.L.R. 132, at p. 134.)

EXCESS OF BORROWING POWER.—The initiating municipality is not authorized to borrow more than its own share of the cost of the proposed drain, that is to say the share to be contributed by itself and the ratepayers assessed within its boundaries, and if the by-law exceeds this limit it is bad. (*Broughton v. Tp. of Grey* (1895) 26 O.R. 694, at p. 707; *Walker v. Tp. of Ellice*, July 17, 1894, MacMahon J.; distinguishing *re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 544.)

Nor to extend the time for the repayment of the debentures beyond the period fixed by the Act. (*Re Armstrong & Tp. of Toronto* (1889) 17 O.R. 766; *re Cooke & Village of Norwich* (1889) 18 O.R. 72.) But by section 432 of the Consolidated Municipal Act, 1903, it is provided that the payment of one year's interest on debentures, and the principal of the matured debentures (if any) shall validate the remaining debentures and the by-law under which they are issued. (See *Standard Life v. Tweed* (1903) 6 O.L.R. 653.) And in this connection the curative provisions of sections 55 and 56 of the Act, and of sections 379, 380, 384 (6) of the Consolidated Municipal Act, 1903, are to be considered. A drainage by-law under which debentures are issued may be registered under the provisions of section 396 of the last mentioned Act, although such registration is not obligatory (see sec. 398) and if registered the curative provisions of section 399 of the Municipal Act apply.

BY-LAW MAY BE TREATED AS VOID ALTHOUGH NOT QUASHED.—A by-law although not quashed within the statutory period, will nevertheless be treated as void or unenforceable if it has been passed without fulfilling the requirements of any statutory condition precedent. (*Sutherland v. Tp. of E. Nissouri* (1853) 10 U.C.Q.B. 626, at p. 628; *Alexander v. Tp. of Howard* (1887) 14 O.R. 22, at p. 43; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417,

at p. 425; *re Tp. of Anderdon & Tp. of Colchester N.* (1891) 21 O.R. 476, at p. 480; *Confederation Life v. Howard* (1894) 25 O.R. 197.)

If a sum sufficient to complete the proposed drain has been received by the initiating municipality and misapplied, a subsequent by-law passed to make an additional levy to replace the sum misapplied is invalid. (*Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1.)

MERE IRREGULARITIES NOT FATAL.—Irregularities in merely directory procedure will not be given effect to, to the extent of quashing a by-law, and especially not where the party complaining has stood by without objecting until the construction of the drain has been proceeded with in good faith, and under color of statutory authority. (*Connor v. Middagh* (1889) 16 A.R. 356, at p. 368; *Tp. of Malahide v. Tp. of Dereham* (1895) 1 C. & S. 243; *re Huson & Tp. of S. Norwich* (1892) 19 A.R. 343, at p. 350; *Davis v. Lake Shore & Ct. Ry.* (1887) 114 Ind. 364; *Prelzinger v. Harness* (1887) 114 Ind. 491.)

It has been held that a drainage by-law which does not conform to the draft by-law contained in schedule B to the Act, in a material respect, is invalid. (*Byrne v. Tp. of N. Dorchester* (1902) 2 C. & S. 318.)

A ratepayer may apply to quash a drainage by-law, although he is assessed only indirectly, as contributing to the general tax fund out of which the assessment levied on the roads of the township in which he resides is paid. (*Dela Haye v. Toronto* (1852) 2 U.C.Q.B. 317; *Byrne v. Tp. of N. Dorchester* (1902) 2 C. & S. 318.)

The fact that no money has been spent under the by-law is a factor which the Court will consider in determining whether it should be quashed or not. (*Re Davis & City of Toronto* (1891) 21 O.R. 243; *re Boulton & Town of Peterborough* (1857) 16 U.C.Q.B. 380.)

ESTOPPEL.—An interested ratepayer, by his conduct in any unequivocal manner, as e.g. by tendering for part of the work, or by making payment of an assessment levied against his lands, with knowledge of the defect complained of, may be estopped from afterwards questioning the validity of the by-law. (*Dillon v. Tp. of Raleigh* (1886) 13 A.R. 53; 14 S.C.R. 739; *Gibson v. Tp. of N. Easthope* (1894) 21 A.R. 504; *Thompson v. Mitchell* (1907) 133 Iowa 527.)

"Shall mail."

The copies of the newspaper containing the proposed by-law should be mailed within a reasonable time of their issue and before the day fixed for the sitting of the Court of Revision, so as to afford any dissatisfied owner an opportunity of being present and objecting. It was said by Hagarty C.J.O. in, *re Hodgins & City of Toronto* (1896) 23 A.R. 80, at p. 83: "An assessment charging lands has always been considered a judicial act, of which the party affected must have notice and be allowed to be heard." And Moss C.J.O., in delivering the judgment of the Court of Appeal, in a case (*re McCrae & Village of Brussels* (1904) 8 O.L.R. 156, at p. 161) arising under the local improvement clauses of the Municipal Act, in which the required notice of assessment had been published in a newspaper, but had not been served on the parties assessed, said: "It is proper that municipalities should be held to a strict compliance with these statutory requisites, and that they

should not be permitted to endeavour to cure their default by evidence of knowledge aliunde." And upon this ground the by-law attacked was quashed. In the earlier case of *re White & Tp. of Sandwich E.* (1882) 1 O.R. 530, however, Cameron J. declined to quash a by-law on the ground that the statutory notice had not been given, where the applicants had knowledge of its provisions from other sources, and had acted upon that knowledge.

Service in lieu
of publication.

22. The municipal council may, at its option, instead of publishing in a newspaper, by resolution direct that a copy of the by-law, including said notice of the sitting of the Court of Revision and notice as to proceedings to quash, written or printed, or partly written and partly printed, be served upon each of the assessed owners, or their lessees or the occupant of their lands, or the agent of such owner, or be left on the lands, if occupied, with some grown up person; and if the lands are unoccupied and the owner or his agent does not reside within the municipality, the council may cause a copy of the by-law and notices to be sent by registered letter to the last known address of such owner; and a statutory declaration shall be made by the person effecting any service or mailing any such registered letter, showing the manner and date of effecting the service or mailing the registered letter; and the said declaration shall be filed by the person making the same, with the clerk of the municipality passing the by-law. R.S.O. 1897, c. 226, s. 22.

"Be left on the lands with some grown up person."

It was held by Boyd C. (*re Stephens & Tp. of Moore* (1894) 25 O.R. 600) upon an application to quash a drainage by-law, that service of a copy of the by-law upon a grown up person at a house upon the assessed premises where all the applicants lived as members of one family was sufficient notice to them all.

"The said declaration shall be filed."

An omission to comply with this provision would not appear to afford substantial grounds for attack on the by-law. See notes to Sec. 93, ss. 3.

If by-law or
part thereof
not quashed
within time
limited.

23. In case no notice of the intention to make application to quash a by-law is served within the time limited for that purpose in the notice attached to the by-law, or where the notice is served, then if the application is not made or is made unsuccessfully in whole or in part, the by-law, or so much thereof as is not

crashed, so far as the same ordains, prescribes or directs anything within the proper competence of the council to ordain, prescribe or direct, shall, notwithstanding any want of form or substance, either in the by-law itself or in the time or manner of passing the same, be a valid by-law. R.S.O. 1897, c. 226, s. 23.

"In case no notice . . . is served."

In construing the provisions of this section the late Mr. Justice Street said (*re Sweetman & Tp. of Gosfield* (1889) 13 P.R. 293, at p. 296): "I think that (this) section must be taken to mean that in case the application is not made within six weeks the by-law shall be valid." But, if as pointed out by Robinson C.J. in the case of *Sutherland v. Tp. of E. Nissouri* (1853) 10 U.C.Q.B. 626, at p. 628, "what is moved against as a by-law was really not passed by a municipal body competent to pass any by-law, then it is not a by-law any more than it would have been if the clerk or any stranger had affixed the corporate seal to a paper purporting to be a by-law, but which had never been seen by the council." And accordingly it has been held on numerous occasions that notwithstanding the provisions of this section, a by-law which has failed to comply with those statutory requirements which are necessary to confer jurisdiction upon the initiating municipality, is subject to collateral attack, and to be treated as a void proceeding after the time limited for moving to quash has gone by. (*Sutherland v. Tp. of E. Nissouri* (1853) 10 U.C.Q.B. 626; *Alexander v. Tp. of Howard* (1887) 14 O.R. 22, at p. 43; *re Tp. of Anderdon & Tp. of Colchester N.* (1891) 21 O.R. 476, at p. 480; *Confederation Life v. Howard* (1894) 25 O.R. 197; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at p. 425.)

"No notice of the intention."

Failure to give the required notice of intention to move to quash debars the applicant, and unless the written notice, whether given by the complainant personally or by his solicitor or agent discloses his name it is deficient. (*Re McCormick & Tp. of Howard* (1889) 18 O.R. 260.)

"Within the proper competence of the council to ordain."

Hagarty C.J.O. in his judgment in *Connor v. Middagh* (1889) 16 A.R. 356, at p. 368, said, in interpreting this phrase: "I doubt if it carry the question any further than the requirement that the by-law be on a subject properly cognizable by the municipality as within their general jurisdiction. If their 'competence' depend on the due observance of every formality as to notice, time, application of parties, neglect or refusal of others to do the work, then of course the protection intended by the Legislature to those acting under the by-law is so narrowed as to be practically useless."

COURT OF REVISION.

24. If the council of the municipality consists of not more than five members, such five members shall be a Court for the revision of the assessments for the drainage work. R.S.O. 1897, c. 226, s. 24.

Court of Revision where council consists of five or less than five.

Where council
contains more
than five
members.

25. If the council consists of more than five members, it shall appoint five of its members to constitute the Court of Revision. R.S.O. 1897, c. 226, s. 25.

Oath of
member of
court.

26. Every member of the Court of Revision shall, before entering upon his duties, take and subscribe before the clerk of the municipality the following oath, or affirmation in cases where by law affirmation is allowed:

I, _____, do solemnly swear (or affirm), that I will, to the best of my judgment and ability, and without fear, favour or partiality, honestly decide the appeals to the Court of Revision from the assessments appearing in a by-law (here set out title of by-law), which may be brought before me for trial as a member of said Court.

R.S.O. 1897, c. 226, s. 26.

In delivering the judgment of the Court of Appeal in the recent case of *re McCrae & Village of Brussels* (1904) 8 O.L.R. 156, MOSE C.J.O., said (p. 161): "As regards the objection that the members of the Court of Revision did not take the oath prescribed for them before entering upon their duties, it is of course highly desirable that this very plain direction of the statute should not be neglected or ignored. The members of council comprising the Court should take the greatest care to see that before they assume to exercise the important judicial functions imposed upon them they are duly qualified in every respect as the statute requires. But it may not necessarily follow that neglect or failure to take the oath renders their acts void."

But this expression of opinion would appear to be in conflict with the decision rendered by the same Court in the earlier case of *Tp. of N. Colchester v. Tp. of N. Gosfield* (1900) 27 A.R. 281, which is not referred to or distinguished, so that the above citation may fairly enough be treated as obiter. In the last mentioned case failure by an engineer to take the oath prescribed by section 5 of the Act before entering upon his duties was held a sufficient ground for treating his report as a nullity. And see *re Burnett & Town of Durham* (1899) 31 O.R. 262, cited ante under section 5.

Quorum.

Members not
to sit on
appeals when
interested.

27. Three members of the Court of Revision shall constitute a quorum, and the majority of a quorum may decide all questions before the Court. But no member of the Court shall act as a member thereof while any appeal is being heard respecting any lands in which he is directly or indirectly interested, save and except roads and lands under the jurisdiction of the municipal council. R.S.O. 1897, c. 226, s. 27.

"He is interested."

It was said by Armour J. in, *re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325, in answer to an objection raised to the vote of a member of the Court of Revision, on the ground that he was an interested party by reason of his property being affected by the proposed drain: "I must hold that no interest can disqualify a councillor, or a member of the Court of Revision from performing his duties as such, that springs solely from his being a ratepayer in the municipality. I cannot see that Fitzpatrick had any other interest than such as sprang solely from his being a ratepayer in the municipality to be benefited and in the locality to be drained." A member of the Court of Revision whose lands are assessed for a proportion of the cost of the proposed drain would, therefore, appear to be justified in sitting upon all appeals brought before the Court except in respect of lands in which he is directly or indirectly interested. But it will be noted that the portion of this section debarring because of interest was enacted subsequently to the date of the above decision. The major part of it was enacted first in 1892 (55 Vic. Ch. 49, sec. 14) and the proviso was added in 1894. (57 Vic. Ch. 56, sec. 27.)

28. (1) The clerk of the municipality shall be the ^{Clerk of Court.} clerk of the Court, and shall record the proceedings thereof and shall issue summonses to witnesses to attend any sittings of the Court.

(2) The summons to any witness issued by the ^{Form of summons.} Clerk under this section may be in the following form:—

You are hereby required to attend and give evidence before the Court of Revision at _____ on the _____ day of 189____, in the matter of the drainage work (naming or describing work) and of the following appeal.

Appellant (name of).

A. B.

Clerk of the township of

(3) The fees payable to any witness on an appeal ^{Witness fees.} to the Court of Revision shall be according to the scale of witness fees in the Division Court. R.S.O. 1897, c. 226, s. 28.

The following schedule of fees payable to witnesses for attendances upon a sittings of a Division Court, are set out in form 3 to The Division Court Rules of 1894.

Attendance, per diem, to witnesses residing within 3 miles of the place where the Court is held, if within the County	\$ 75
And if without the County	1.00
Attendance, if witness resides over 3 miles from the place of sittings, and within the County, per diem	1.00
Attendance, if witness resides without County and more than 3 miles from the place of sittings per diem	1.25

Barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give professional opinions, per diem

4.00

If witnesses attend in one case only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportionate part in each case only.

The travelling expenses of witnesses, over three miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.

By The Ontario Land Surveyors Act, R.S.O. 1897, Ch. 180, sec. 40, it is provided that an Ontario Land Surveyor is entitled to \$5 a day, and his travelling expenses for each day he attends any civil or criminal court, under summons, to give evidence in his professional capacity.

Meeting and
adjournments.

29. At the time appointed, the Court shall meet and try all complaints in regard to owners wrongly assessed or omitted from assessment, or assessed at too high or too low an amount, and the Court may adjourn from time to time as required. R.S.O. 1897, c. 226, s. 29.

"At the time appointed."

That is to say not earlier than twenty nor later than thirty days from the day on which the by-law was first published, as provided by section 33 of the Act. The first meeting of the Court of Revision must be held upon the day fixed by the notice published or served with the proposed by-law.

The engineer in charge of the work should be notified of the proposed meeting and be present at it, although his absence would not be sufficient ground for setting aside the proposed by-law, if no injury has been occasioned thereby. *Re McLean & T^p. of Ops* (1880) 45 U.C.Q.B. 325.

In the proper order this section would appear to come naturally next after section 37 of the Act.

Administering
oaths and
summoning
witnesses.

30. The evidence of witnesses shall be taken on oath and any member of the Court may administer an oath to any party or witness. R.S.O. 1897, c. 226, s. 30.

Witness
failing to
attend when
summoned

31. If any person summoned to attend the Court of Revision as a witness fails, without good and sufficient reason, to attend (having been tendered the proper witness fees) he shall incur a penalty of \$20 to be recovered with costs, by and to the use of any person suing for the same, either by suit in the

proper Division Court, or in any way in which penalties incurred under any by-law of the municipality may be recovered. R.S.O. 1897, c. 226, s. 31.

Procedure for Trial of Complaints.

32. Any owner of land, or, where roads in the municipality are assessed any ratepayer, complaining of overcharge in the assessment of his own land or of any roads of the municipality, or of the undercharge of any other lands, or of any road in the municipality, or that lands or roads within the area described in the petition which should have been assessed for benefit, have been wrongly omitted from the assessment, or that lands or roads which should have been assessed for outlet liability or injuring liability have been wrongly omitted, may personally, or by his agent, give notice in writing to the clerk of the municipality, that he considers himself aggrieved for any or all of the causes aforesaid. R.S.O. 1897, c. 226, s. 32.

Who may give notice of appeal.

"Any owner of land."

That is to say any owner who is assessed in respect of land which lies within the bounds of the municipality holding the Court of Revision. See section 33. If the land assessed is not within the limits of the initiating municipality, the appellant must bring on his appeal before a sittings of the Court of Revision of the municipality within which the land lies. Provision for the holding of such sittings is made by section 62 of the Act.

By sub-section 7 of section 2 of the Act the term "owner" is defined to include "a municipal corporation as regards highways under their jurisdiction." It would appear therefore that a municipality might appeal in any case in which an assessment has been levied against its roads for the construction of the drain. And the fact of such an appeal being taken would not appear to disqualify the members of the Court of Revision on the ground of interest. (*Re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325, at p. 335.)

"May give notice in writing."

A written notice of a proposed appeal should be given to the clerk of the municipality in order that he may prepare the notices, provided by section 34, to be served upon any owners whose lands are claimed to be assessed too low or to be wrongfully omitted from assessment, and also that he may prepare a list of the appeals for the information of the assessed ratepayers, as provided by section 37.

33. The trial of complaints shall be had in the first instance by and before the Court of Revision of the municipality in which the lands and roads assessed

Time for holding Court of Revision.

Notice

are situate, and the first sitting of such Court shall be held pursuant to notice on some day not earlier than twenty nor later than thirty days from the day on which the by-law was first published, or from the date of completing the services or mailing of a printed copy of the by-law, as the case may be; notice of the first sitting of the Court shall be published or served with the by-law, but the Court may adjourn from time to time as occasion may require; and all notices of appeal shall be served on the clerk of the municipality at least ten days prior to the first sitting of the Court; but the Court may, though such notice of appeal be not given, by resolution passed at its first sitting, allow an appeal to be heard on such conditions as to giving notice to all persons interested or otherwise as may be just. R.S.C. 1897, c.226, s. 33.

"The trial of complaints shall be had by and before the Court of Revision"

The jurisdiction of the Court of Revision to rectify errors and omissions in assessments is exclusive, subject only to appeal to the Judge of the County Court as provided by the Act, and if an owner wrongly or too highly assessed does not take advantage of his statutory right to appeal to the Court of Revision he is precluded from afterwards having the by-law declared invalid or inoperative as to him on any such ground. The law upon this point was set out by the late Mr. Justice Lister, in delivering the judgment of the Court of Appeal in, *re Tp. of Rochester & Tp. of Mersea* (1899) 26 A.R. 274, at p. 481, as follows: "It may be that an assessment for the cost of a work, such as the drainage work in question, is unequal and unjust; lands may have been assessed too high while other lands may have been assessed too low; lands may have been assessed which ought not to have been assessed, and other lands which ought to have been assessed, may have been omitted, but these are all matters proper to be adjudicated and determined by the Court of Revision of each municipality, and not by the Referee, who under the Act is authorized to deal with the gross amount of the assessment against each municipality assessed." The following additional authorities support the text as above. (*Re Montgomery & Tp. of Raleigh* (1871) 21 U.C.Q.B. 381, at p. 393; *re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325; *re White & Tp. of E. Sandwich* (1882) 1 O.R. 530; *re Stephens & Tp. of Moore* (1894) 25 O.R. 600; *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 420; *Blake v. The People* (1884) 109 Ill. 504; *Wabash Eastern Ry. v. Lake Fork Drainage District* (1890) 134 Ill. 384.)

"Not earlier than twenty nor later than thirty days."

It may be questioned whether this provision is anything more than a directory requirement, having for its object the prevention of surprise on the one hand and the speedy determination of assessment appeals on the other; and also that the meetings of the

Court of Revision should be held contemporaneously with the period of publication. If due notice of the time and place of the first meeting of the Court of Revision had been given, and the meeting held at the time and place appointed, the fact that the meeting had by inadvertance been held on an earlier or a later date than that prescribed by the section would not appear to vitiate the proceedings, but would probably be treated as a minor irregularity such as the law overlooks. (See *re Smith & Tp. of Plympton* (1886) 12 O.R. 20, at p. 34.)

"All notices of appeal."

See section 32 above.

34. If any complaint is made on the ground that any lands or roads have been assessed too low or wrongly omitted from assessment by the engineer or surveyor, the clerk shall give notice of the complaint and the time of the trial to the owner or person interested in such lands or in the case of roads to the reeve or other head of the municipality; which notice shall be in the form following or to the like effect:

Form of notice
of complaint.

Take notice that you are required to attend before the Court of Revision at _____ on the _____ day of _____ 189____, in the matter of the following appeal :—

"Appellant (name of).

Subject—That you are assessed too low (or as the case may be) for drainage work (naming the drainage work).

"To J. K.

(Signed.)

X. Y.
Clerk."

R.S.O. 1897, c. 226, s. 34.

35. The notice in the preceding section mentioned shall be sent by letter addressed to such person and to his post office address or to his last known address, at least seven days before the first sitting of the Court for the trial of complaints. R.S.O. 1897, c. 226, s. 35.

Serving
notice.

36. The clerk of the Court shall enter the appeals on a list in the order in which they are received by him, and the Court shall proceed with the appeals in the order, as nearly as may be, in which they are so entered, but may grant an adjournment or postponement of any appeal. R.S.O. 1897, c. 226, s. 36.

Entry of
appeals.

Form of list
of appeals.

37. Such list may be in the following form:—

Appeals from the assessment of the engineer on
drainage work, to be heard at the Court of Revision to be held at
commencing at 10 o'clock in the forenoon on the
day of 189 .

<i>Appellant.</i>	<i>Omitted or wrongly assessed.</i>	<i>Matter complained of.</i>
A. B.	Self	Overcharged for benefit.
C. D.	Self	Overcharged for outlet
E. F.	Self	Overcharge for injuring.
G. H.	J. R.	Undercharge for benefit.
L. M.	N. O.	Undercharge for outlet.
P. Q.	R. S.	Undercharge injuring.
T. U.	V. W.	Wrongly omitted.
X. Y.	Self	Wrongly assessed.
etc.	etc.	etc.

R.S.O. 1897, c. 226, s. 37.

Court of Revision may take
into consideration prior
assessments.

38. In case any lands or roads have been assessed for the construction or repair of a drainage work, and the same property is afterwards assessed by the engineer or surveyor for the construction or repair of any other drainage work, the Court of Revision or Judge may take into consideration any prior assessment for drainage work on the same property and give such effect thereto as may be just. R.S.O. 1897, c. 226, s. 38.

This section confers the same power to consider prior assessments upon the Court of Revision that is conferred upon the engineer by section 13 of the Act. See notes to that section.

Adjournment
of Court to
notify persons
affected by
alteration of
assessments.

39. When the ground of complaint is, that lands or roads are assessed too high, and the evidence adduced satisfies the Court of Revision or Judge that the assessments on such lands or roads should be reduced, but no evidence is given of other lands or roads assessed too low or omitted, the Court or Judge shall adjourn the hearing of such appeal, for a time sufficient to enable the clerk to notify by postal card or letter all persons affected of the date to which such hearing is adjourned; the clerk shall so notify all persons interested, and unless they appear and show cause against the reduction of the assessment appealed against or the increase of their own, the Court or Judge may dispose of the matter of appeal in such manner as may be just, and the sum by which the assessment appealed against

is reduced (if any) may be distributed *pro rata* over the assessments of its own class or otherwise so as to do justice to all parties. R.S.O. 1897, c. 226, s. 39.

"The sum by which the assessment appealed against is reduced may be distributed"

If the Court of Revision reduce the assessments appealed against they must necessarily add the amount by which these assessments have been reduced to the assessments of the owners who have not appealed, *pro rata* or in such other manner as may be just so that the aggregate amount of the levy shall remain the same as it would have been had there been no appeal, as otherwise a sufficiently large sum would not be levied to complete the work as contemplated. (*Re Clark & Tp. of Howard* (1888) 16 A.R. 72, per Burton J.A., at p. 79.)

40. The clerk shall by registered letter immediately after the close of the Court, notify all appellants of the result of their appeals and also of the date of the closing of the Court of Revision. R.S.O. 1897, c. 226, s. 40. Notice of result of appeal.

APPEALS FROM COURT OF REVISION.

41. An appeal from the Court of Revision shall lie to the County Judge of the county within which the municipality is situate, and not only against a decision of the Court of Revision but also against the omission, neglect or refusal of said Court to hear or decide an appeal. R.S.O. 1897, c. 226, s. 41. Appeal to County Judge.

WHO MAY APPEAL.—Any person (including within this term a municipality) affected by the proceedings of the Court of Revision is entitled to appeal to the County Court Judge. (*Re Dundas St. Bridges* (1904) 8 O.L.R. 52, at p. 59; and see *Re British Mortgage Loan Company* (1898) 29 O.R. 641.)

"Against the refusal of the said Court to decide an appeal."

Meredith J., in delivering his judgment in, *re Dundas St. Bridges* (1904) 8 O.L.R. 52 (subsequently affirmed by a Divisional Court, vide *loc. cit.*) said, at p. 59: "If no appeal lay, mandamus would lie, and would go, requiring the Court of Revision to perform its duty of revising the assessments as the law requires. It ought not to be imagined that a failure of the Court to perform its functions could shift the burden of taxation from the ratepayers who ought to pay it."

42. The person appealing shall, in person or by solicitor or agent, file with the clerk of the municipality within ten days after the date of the closing of the Court of Revision, a written notice of his intention to appeal to the Judge. R.S.O. 1897, c. 226, s. 42. Time for giving notice of appeal.

"The person appealing."

By virtue of the definition given to "person" by section 8 (13) of The Interpretation Act (R.S.O. 1897, Ch. 1) this phrase includes any body corporate or politic or party. (See *re Dundas St. Bridges* (1904) 8 O.L.R. 52, at p. 59.)

"A written notice of his intention."

The notice of appeal should be given by or on behalf of the actual applicant, whose name should be disclosed by the notice. (*Re McCormick & Tp. of Howard* (1889) 18 O.R. 260.)

Clerk to notify
Judge and
Judge to fix
time and
place for hear-
ing appeals.

43. The clerk shall immediately after the time limited for filing appeals, forward a list of the same to the Judge, who shall then notify the clerk of the day he appoints for the hearing thereof and shall fix the place for holding such hearing at the town hall or other place of meeting of the council of the municipality from the Court of Revision of which the appeal is made unless the Judge for the greater convenience of the parties and to save expense fixes some other place for the hearing. R.S.O. 1897, c. 226, s. 43.

Notice to per-
sons appealed
against

44. The clerk shall thereupon give notice to all the parties appealed against, in the same manner as is provided for giving notice on a complaint to the Court of Revision, but in the event of failure by the clerk to give the required notice, or to have the same given within proper time, the Judge may direct notice to be given for some subsequent day upon which he may try the appeals. R.S.O. 1897, c. 226, s. 44.

Time for giv-
ing judgment

45. At the Court so holden the Judge shall hear the appeals and may adjourn the hearing from time to time, but shall deliver judgment not later than 30 days after the hearing. R.S.O. 1897, c. 226, s. 45.

"Not later than 30 days."

It has been held that an analogous provision of the Ditches and Watercourses Act is merely directory, and that a judgment delivered after the lapse of the prescribed period of time is valid. (*Re McFarlane & Miller* (1895) 26 O.R. 516.) See also *Re Ronald & Village of Brussels* (1882) 9 P.R. 232, at p. 237; *Re Smith & Tp. of Plympton* (1886) 12 O.R. 20.

Clerk of Court

46. (1) The clerk of the municipality shall be the clerk of such Court, and shall record the proceedings thereof and shall have the like powers as the clerk

of a Division Court as to the issuing of subpoenas to witnesses upon the application of any party to the proceedings or upon an order of the Judge for the attendance of any person as a witness before him.

(2) The fees to be allowed to witnesses upon an appeal to the Judge under this Act shall be those allowed to witnesses in an action in the Division Court. Witness fees. R.S.O. 1897, c. 226, s. 46.

"As the Clerk of a Division Court."

See R.S.O. 1897, Ch. 60, secs. 137 *et sequ.*

"The fees.....shall be those allowed to witnesses.....in the Division Court."

See notes to section 28 above.

47. In all proceedings before the County Judge as aforesaid he shall possess all such powers for compelling the attendance of and for the examination on oath of all parties, and all other persons whatsoever, and for the production of books, papers and documents, and for the enforcement of his orders, decisions and judgments as belong to or might be exercised by him in the Division Court or County Court. Powers of Judge on appeal. R.S.O. 1897, c. 226, s. 47.

Fees and Costs of Appeals.

48. The costs of any proceeding before the Court of Revision, or before the Judge as aforesaid, shall be paid or apportioned between the parties in such manner as the Court or Judge thinks fit, and the same shall be enforced when ordered by the Court of Revision by a distress warrant under the hand of the clerk and the corporate seal of the municipality, and when ordered by the Judge, by execution to be issued as the Judge may direct, either from the County Court or any Division Court within the county in which the municipality is situate. Apportionment of costs—enforcing payment. R.S.O. 1897, c. 226, s. 48.

49. The costs chargeable or to be awarded in any case may be the costs of witnesses and of procuring their attendance and none other, and the same shall be taxed according to the allowance in the Division Court for such costs, and in cases where execution issues, the costs thereof as in the like Court and of enforcing the same may also be collected thereunder. What costs may be awarded of taxation. R.S.O. 1897, c. 226, s. 49.

Fees and
expenses of
Judge

50. The Judge shall be entitled to receive from the municipality as his expenses for holding court in any place in the municipality, other than the county town, for the hearing of appeals from the Court of Revision, the sum of five dollars per day and disbursements necessarily incurred. R.S.O. 1897, c. 226, s. 50.

Decision to
be final

51. The decision of the County Judge as aforesaid shall be final and conclusive. R.S.O. 1897, c. 226, s. 51.

Shall be final and conclusive."

The clear intent of the Act is that appeals against individual assessments shall not be carried further than an appeal to the Judge of the County Court as provided by the Act, and that his decisions upon such matters are not subject to review by any higher Court. (See *York v. Tp. of Osgoode* (1892) 24 O.R. 12, and cases cited above under section 33 of the Act; *re Tp. of Rochester & Tp. of Mersea* (1899) 26 A.R. 474, at p. 481.)

Clerk to alter
assessments
conformably
with result of
appeals

52. Any change in the assessment of the engineer or surveyor made by the Court of Revision or Judge in appeal therefrom, shall be given effect to by the clerk of the municipality altering the assessments and other parts of the schedule to comply therewith, and the by-law shall before the final passing thereof be amended to carry out any changes so made by the Court of Revision or Judge. R.S.O. 1897, c. 226, s. 52.

"The by-law shall be amended to carry out any changes."

A drainage by-law is to be passed provisionally before and finally after the revision of assessments by the Court of Revision, or by the Judge of The County Court on appeal therefrom, or after the time for taking such appeals has elapsed. To give the by-law its final reading and bring it into force at an earlier date would be to invalidate the whole proceeding in all cases where any alteration in assessments was subsequently made, or opportunity to take such appeals prevented. (*Re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 543; *re Dundas St. Bridges* (1904) 8 O.L.R. 52, at p. 58.) Provision was formerly made by statute (see 55 Vic. (1892) Ch. 42, sec. 570 (3)) for the passing of an amending by-law containing the alterations made by the Judge in assessments, in cases where the by-law had been finally passed before appeals before him were determined. This subsection passed out of existence on the consolidation of the Drainage Act in 1894.

ISSUE OF DEBENTURES.

Debentures
may include
principal and
interest in
one sum.

53. Any municipal council issuing debentures under this Act, may include the interest on the debentures in the amount payable, in lieu of the interest being

payable annually in respect of each debenture, and any by-law authorizing the issue of debentures for a certain amount and interest, shall be taken to authorize the issue of debentures, in accordance with this section, to the same amount with interest added. R.S.O. 1897, c. 226, s. 53.

DEBENTURES.—It has been held that a purchaser of drainage debentures is bound to satisfy himself at his own risk, that the municipality is authorized to issue them. (*Wiltshire v. Tp. of Surrey* (1891) 2 B.C.R. 79. And see *Fitzgerald v. Molsons Bank* (1898) 29 O.R. 105; *Hart v. City of Halifax* (1903) 35 N.S.R. 1.) But see sec. 56 below by which debentures are validated in the hands of purchasers, if no application to quash the by-law is made within six weeks of its final passing.

The following form of debenture providing for the repayment of principal and interest by successive annual payments of equal amount is patterned on the form given in the schedule to The Drainage Act, R.S.O. 1897, Ch. 41, Form 5.

No. No.
Drainage Debenture of the (township) of

The Corporation of the (township) of, in the County of and Province of Ontario, hereby promises to pay to or order, at the Bank of, in the (City) of, the sum of (one hundred) dollars, (\$.....) of lawful money of Canada, and interest thereon at per centum per annum, in (twenty) equal annual instalments of principal and interest of \$..... each, the first of such instalments to be paid on the day of, A.D. 19... and succeeding instalments at successive yearly intervals thereafter.

This debenture is issued pursuant to By-law No. of the said Corporation, intituled, "A By-law to raise the sum of \$..... for the construction (or repair or extension) of the drainage work.

A. B.
Reeve.

C. D.
Treasurer.

(Seal of the Corporation.)

\$
Coupon for the (twentieth)
Annual Instalment of
Drainage Debenture No.,
issued under By-law No.,
of the Corporation of the (town-
ship) of Amount
\$..... Payable at the Bank
of in the
of on the
day of A.D.

A. B. C. D.
Reeve Treasurer.

\$
Coupon for the (nineteenth)
Annual Instalment of
Drainage Debenture No.,
issued under By-law No.,
of the Corporation of the (town-
ship) of Amount
\$..... Payable at the Bank
of in the
of on the
day of A.D.

A. B. C. D.
Reeve Treasurer.

Payment of
assessment
before debentures
issued.

54. Any owner of lands or roads, including the municipality, assessed for the work, may pay the amount of the assessment against him or them, less the interest, at any time before the debentures are issued, in which case the amount of debentures shall be proportionately reduced. R.S.O. 1897, c. 226, s. 54.

Informalities
not to invali-
date debentures.

55. No debentures issued or to be issued under any by-law for the construction or maintenance of any drainage work, shall be held to be invalid on account of the same not being expressed in strict accordance with such by-law, provided that the debentures are for sums in the aggregate not exceeding the amount authorized by the by-law. R.S.O. 1897, c. 226, s. 55.

When debentures to be
valid and
binding to
extent of
amount
advanced.

56. Any debentures issued and sold to provide any sum of money for the construction or repairs of any drainage work, shall be good in the hands of the purchaser, and be binding upon the corporation issuing them, to the extent of the money actually advanced on the security, and interest thereon, according to the provisions of same, provided no application to quash be made within six weeks from the final passing of the by-law authorizing the issue thereof notwithstanding the by-law be afterwards quashed or declared illegal in any proceedings. R.S.O. 1897, c. 226, s. 56.

This section came into force in 1894, 57 Vic. Ch. 56, sec. 56. In a case decided upon the law as it stood before the enactment of this section (*Confederation Life v. Tp. of Howard* (1894) 25 O.R. 197), Ferguson J. held that although the by-law in question was a void proceeding, the plaintiffs were nevertheless entitled to recover the amount of a debenture issued under it upon the ground that the municipality had received the money upon a consideration which had failed.

"Within six weeks."

See notes collected under sec. 21 (1) above.

The various sections of the Municipal Act validating debenture by-laws and the debentures issued under such by-laws, upon the taking of certain defined proceedings should be consulted in conjunction with the above section. A drainage by-law may be registered under the provisions of section 396 of the Consolidated Municipal Act, 1903, although such registration is not compulsory (see sec. 398) and if registered the validating provisions of section 399 of the Act apply. And by section 432 of the same Act it is provided that the payment of interest for one year or more on any

debentures issued under any municipal by-law, and the payment of the principal of any debentures which have matured during the same period shall validate the by-law and the debentures issued under it. See *Standard Life v. Tued* (1903) 6 O.L.R. 653.

WORK NOT CONTINUED IN ANOTHER MUNICIPALITY.

57. (1) Where any drainage work is not continued into any other than the initiating municipality, any lands or roads in the initiating municipality or in any other municipality, or roads between two or more municipalities, which will, in the opinion of the engineer or surveyor, be benefited by such work or furnished with an improved outlet or relieved from liability for causing water to flow upon and injure lands or roads, may be assessed for such proportion of the cost of the work as to the engineer or surveyor seems just.

Drainage work not continued into another municipality.

(2) A drainage work shall not be deemed to be continued into a municipality other than the initiating municipality, merely by reason of such drainage work or some part thereof being constructed on a road allowance forming the boundary line between two or more municipalities. R.S.O. 1897, c. 226, s. 57.

The object of this section is to authorize the assessing of such lands lying in an adjoining higher township, as will receive benefit from the construction of the proposed drain, for part of the cost of a drainage work initiated by and confined to the limits of the lower township. (*Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, per Osler J.A., at p. 524.)

ASSESSMENTS OF LANDS IN ADJOINING MUNICIPALITIES MUST BE BASED ON BENEFIT.—The late Mr. Justice Gwynne, in delivering the judgment of the Supreme Court in *Broughton v. Tps. of Grey & Elma* (1897) 27 S.C.R. 495, at p. 503, said, in this connection: "There does not appear in any of the Acts a scintilla of intent on the part of the Legislature to legislate in such a manner as to enable one municipality by a by-law passed by its council to impose upon lands situate in another municipality an obligation to contribute to the cost of the construction and maintenance of a drain constructed within the limits of the former municipality for the drainage of lands situate therein, which work, in point of fact, contributed no benefit whatever upon the lands in the other municipality. The whole scheme of the legislation upon the subject is that they who derive benefit from such a work and they only shall bear the burden of its construction and maintenance."

Lands in a neighbouring municipality assessed for part of the cost of constructing a drainage work, which is not continued into it, must be specified and charged separately with their just proportions of the cost or the scheme is invalid. (*Tp. of Thurlow v. Tp. of Sidney* (1882) 1 O.R. 240, at p. 258; *re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 547.)

Construction
of drainage
work on road
allowance.

58. Where it is necessary to construct any drainage work or any part thereof on a road allowance used as a boundary line between two or more municipalities, the municipal council or councils of the adjoining municipalities may, on the petition of the majority of owners in the area therein described and within its own limits, authorize the same to be constructed on the allowance for road between the municipalities, and may make the road as provided by section 10, and the engineer or surveyor may assess and charge the lands and roads benefited or otherwise liable to assessment in the adjoining municipality or municipalities, as well as the road allowance, with such proportion of the cost of constructing the said work as he may deem just. R.S.O. 1897, c. 226, s. 58.

WORK CONTINUED INTO ANOTHER MUNICIPALITY.

Continuing
work beyond
the limit of
municipality.

59. Where it is required to continue any drainage work beyond the limits of the municipality, the engineer or surveyor employed by the council of such municipality may continue the survey and levels on or along or across any allowance for road or other boundary between any two or more municipalities, and from any such road allowance or other boundary into or through any municipality until he reaches a sufficient outlet; and in every such case he may assess and charge regardless of municipal boundaries, all lands and roads to be affected by benefit, outlet or relief with such proportion of the cost of the work as to him may seem just; and in his report thereon he shall estimate separately the cost of the work within each municipality and upon the road allowances or other boundaries. R.S.O. 1897, c. 226, c. 59.

"Where it is required to continue."

That is to say where it is necessary to continue the drainage work beyond the limits of the initiating municipality in order to find a sufficient outlet for the water to be carried off by the proposed drain. The engineer is authorized to continue the work through the adjoining municipality "until he reaches sufficient outlet." Once he has reached such an outlet his authority to construct and assess in the non-initiating municipality is at an end. (*Tp. of Dover v. Tp. of Chatham* (1884) 5 O.R. 325, at p. 344; same case (1886) 12 S.C.R. 321, at p. 341; *Tp. of W. Missouri v. Tp. of N. Dorchester* (1887) 14 O.R. 294, at p. 298; *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, at p. 524; *Wigle v. Tps. of N. & S. Gosfield* (1902) 2 C. & S. 186.)

The onus of establishing that it is necessary to construct the drain into or through the territory of a non-initiating municipality, in case of contest, rests upon the municipality that has undertaken the work. (*Tp. of Dover v. Tp. of Chatham* (1886) S.C.R. 321, at p. 350.) In *re Tp. of Raleigh & Tp. of Harwich* (1899) 26 A.R. 313, at p. 317, Osler J.A., in speaking of the right to project a drain into a neighbouring municipality for purposes of outlet, said: "It is bound to make out that it is reasonably necessary, and that it is, so far as it can be made so, complete in itself, and one which is not likely to involve the construction of a new work by the latter township in order to relieve itself from the waters which the other will bring down upon it."

"May continue until he reaches a sufficient outlet."

While the engineer is authorized to project the proposed drain into a non-initiating municipality to a point where the fall is sufficient and the outlet large enough to carry off the water without injury to the surrounding land, it is contrary to the intent of the Act and therefore beyond his authority to stop short of reaching such point. The law in this respect is concisely set out in the following citation from the judgment of the Supreme Court in *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 446 (judgment delivered by Gwynne J.): "I have always held the opinion that one township cannot discharge the waters collected within its area, either just inside of, or anywhere in, another township, there to be let loose, without being liable for damages to the parties injured thereby. But in such case the liability would, in my opinion, arise from an act done without any jurisdiction whatever, utterly ultra vires, and not merely as for negligence in the mode of performing an act legal in itself." See also to the same effect, *re Tp. of Raleigh & Tp. of Harwich* (1899) 26 A.R. 313, at p. 318; *Wigle v. Tps. of N. & S. Gosfield* (1902) 2 C. & S. 186, at p. 194; *Chatwin v. Rural Mun. of Rosedale* (1907) 6 W.L.R. 474.)

"Sufficient Outlet."

As to what constitutes a sufficient outlet see sec. 2 (11) above; *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446 at p. 450; *Hart v. Scott* (1907) 168 Ind. R. 530.

The opinion was expressed by Boyd C. in *Tp. of W. Nissouri v. Tp. of N. Dorchester* (1887) 14 O.R. 294, at p. 298, that the statute did not authorize the carrying of a drain into a neighbouring township for the purpose of obtaining a sufficient outlet, unless that outlet could be found within a reasonable distance of the boundary line between the two townships. But the only limitation imposed by the Act as to the distance that the drain may traverse in a non-initiating municipality would appear to be should not be carried beyond the nearest feasible outlet.

Before a drain can be lawfully constructed through the territory of an adjoining municipality an accurate plan and report of the proposed work must be prepared and served, showing the course and terminal point of the drain and affording other proper information so that the non-initiating municipality may be in a position to determine whether the proposed work is within the jurisdiction conferred by the Act. (*Tp. of Dover v. Tp. of Chatham* (1884) 5 O.R. 325, at p. 345; *Tp. of Waterloo v. Town of Berlin* (1904) 8 O.L.R. 335, at p. 338; sec. 61.)

"He may assess and charge."

In construing the provisions of this section, the late Mr. Justice Gwynne (*Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 341), said: "The only case in which power is given to charge the municipality into which the work is continued, or the lands situate within the limits of such municipality, with any part of the cost of such work is in the event that the lands of the municipality (in which term I include its roads) or the lands of individual owners situate within the limits of the municipality, derive a special benefit from the work, and such power is limited to the extent of such benefit, by which term is applied to such a case, I understand, that the roads and lands so charged should derive such a substantial benefit from the work beyond that which they respectively enjoyed independently of such work as to make it plainly just and proper that they should be made to contribute to the cost of a work undertaken for the sole benefit of lands situate in another municipality, and actually necessary for effecting that object." In this case the Court held that the drain in question did not benefit the lands in the contesting municipality and set aside the award. In the more recent case of *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 444, the decision reached in *Tp. of Dover v. Tp. of Chatham* *supra* was summarized and affirmed.

The total cost of the proposed drainage work must be borne by the lands and roads in the initiating municipality assessed therefor, less such sums as are properly levied against lands and roads in adjoining or neighbouring municipalities through or into which the work is constructed, for actual benefit received by such lands and roads individually, as a result of the construction of the work. If therefore evidence disproves the supposed benefit to any or all of the assessed parcels of land in such latter municipalities, so much of the assessment as is not justified fails entirely, and the amounts struck off are not to be reimposed on other assessed lands in any of the non-initiating municipalities. This would appear to be the effect of the judgment of the Court of Appeal in, *re Tp. of Romney & Tp. of Tilbury W.* (1891) 18 A.R. 477. And see also *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at pp. 355 & 358.

The onus of supporting an assessment levied upon lands or roads of a neighbouring municipality rests upon the initiating municipality. Gwynne J. in his judgment in *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, said, p. 342: "All the work done in the lower municipality must be regarded as being essential and necessary for the accomplishment of the purpose of the upper municipality, and the owners of property therein which is benefited thereby, the incidental benefit, therefore, if any there be, to the roads and lots in the lower municipality should be very clearly established beyond all manner of doubt, to warrant the lands in the lower municipality being subjected, against the will of the owners, to contribute to the cost of a work wholly necessary for the benefit of the owners in the upper municipality."

As to the mode of assessing lands in neighbouring municipalities, it has been said by Wilson J. in, *re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 547: "In my opinion the engineer or surveyor must, in case lands or roads beyond the municipality commencing the work are to be assessed, assess every road and lot or portion of lot, according to the proportion of benefit the same, in his opinion, derives from or will derive from the work. It must be done so that each municipality may under-

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stand for what and upon what the assessment has been made, in order to test its own liability, and in order to ascertain in like manner for what and upon what lands or roads the other municipalities have been assessed." Similar declarations of the engineer's duty in this regard will be found in *Tp. of Thurlow v. Tp. of Sidney* (1882) 1 O.R. 249, at p. 259; *Tp. of Chatham v. Tp. of Dover* (1886) 12 S.C.R. 321, at p. 351.

"To be affected by benefit, outlet or relief."

(The cases determining what constitutes benefit within the meaning of the Act, and under what circumstances an assessment for benefit is justified, will be found collected under section 3 (1) above; the cases determined upon assessments for outlet under section 3 (4), and the cases construing the provisions of the Act permitting assessments for "injuring liability" or "relief" under section 3 (3) above.)

60. Whenever any lands or roads in or under the jurisdiction of any adjoining or neighbouring municipality, other than the municipalities into or through which the drainage work passes, are, in the opinion of the engineer or surveyor of the initiating or other municipality doing the work or part thereof, benefited by the drainage work or provided with an improved outlet or relieved from liability from causing water to flow upon and injure lands or roads, he may assess and charge the same as is provided in the next preceding section. R.S.O. 1897. c. 226, s. 60.

Charging neighboring municipality when work does not enter same.

This section provides for cases where the drain, by reason of its construction through or into a neighbouring municipality for the purpose of obtaining a sufficient outlet, incidentally affords better drainage or an improved outlet, or relieves from injuring liability, higher lands or roads in any adjoining municipality not in the direct course of the drain.

SETTLING ASSESSMENTS, ETC., BETWEEN MUNICIPALITIES

61. The council of any initiating municipality shall serve the head of the municipality or municipalities into or through which the work is to be continued, or whose lands or roads are assessed without the drainage work being continued into it, with a copy of the report, plans, specifications, assessments and estimates of the engineer or surveyor on the proposed work, and unless the same are appealed from as hereinafter provided, they shall be binding on each and every corporation whose council is so served, and the council of the initiating municipality shall be entitled

Council of initiating municipality to serve other municipalities to be affected.

in the event of no appeal, to proceed with the by-law and authorize and construct or procure the construction of the whole drainage work in accordance therewith. R.S.O. 1897, c. 226, s. 61.

"*Shall serve.*"

Until service of the report and assessments has been made upon the non-initiating municipalities, and any appeal therefrom has been determined, or the time for appealing allowed by section 63 has elapsed, the by-law cannot be finally passed and the work undertaken, as there would be no certainty that the assessments might not be reduced or struck off altogether. (*Re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 543.)

"*The head.*"

Where service was made upon the clerk of the municipality instead of upon the reeve, and no objection was taken at the time, it was held by Drainage Referee Britton that no effect should be given to this irregularity after the work had been undertaken. (*Tp. of Malahide v. Tp. of Dereham* (1895) 1 C. & S. 243.)

"*Whose lands.*"

This phrase is apparently intended to include not merely lands belonging to the municipality, but all other lands owned by private proprietors, within the limits of the municipality, which have been assessed for the construction of the drain, and therefore to be equivalent to saying "in which lands, etc." Although this inaccurate phraseology was remarked upon many years ago it has never been altered. (See *re Tp. of Dover & Tp. of Chatham* (1884) 5 O.R. 325, at p. 341.)

"*Unless the same are appealed from.*"

See sec. 63 below, and *Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4, at pp. 14 & 15.

Municipality
served to
raise and pay
over its pro-
portion of cost.

62. The council of the municipality so served, shall in the same manner as nearly as may be, and with such other provisions as would have been proper if a majority of the owners of the lands to be taxed had petitioned as provided in section 3 of this Act, pass a by-law or by-laws to raise, and shall raise and pay over to the treasurer of the initiating municipality within four months from such service, the sum that may be named in the report as its proportion of the cost of the drainage work, or, in the event of an appeal from the report, the sum that may be determined by the Referee or Court of Appeal, and such council shall hold the Court of Revision for the adjustment of assessments upon its own ratepayers in the manner hereinbefore provided. R.S.O. 1897, c. 226, s. 62.

"In the same manner."

The by-law must conform to the provisions of sections 19 and 20 of the Act, and follow substantially the draft by-law set out in Schedule B. The publication required by section 21, or the service required by section 22 must be given.

"With such other provisions."

"That is to say provisions for borrowing on debentures the required sum and for levying the sums charged on the several lots, by special yearly rates on the respective lots, and for raising the amount charged on roads by a general assessment on the ratepayers of the municipality." Per Gwynne J., in *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 359.

"Shall raise and pay over."

The steps to be taken by a non-initiating municipality under this section are set out by Rose J. (*Broughton v. Tps. of Grey & Elma* (1895) 26 O.R. 694, at p. 706) as follows: "After the adoption of the report, plans and estimates by the initiating municipality a copy of the report, plans, specifications, assessment, and estimates may be served on the contributing municipalities, and if there is no appeal from them they become binding, and it becomes the duty of such municipalities within four months to pass by-laws to raise and pay over to the treasurer of the initiating municipality the sums named in the report to be contributed by them, and such contributing municipalities are to raise such sums by assessing and levying a special rate on the real property to be benefited by the work within their respective boundaries in accordance with the report and assessment in like manner as the initiating municipality is required to do. The engineer therefore, subject to appeal and revision settles the amounts to be paid by each municipality, the property to be benefited, and the sum to be assessed and levied on each lot or portion of lot and road. There is but one scheme and one assessment, and each municipality, within its own borders, by the like machinery raises the sum which it is bound to contribute. All these sums come into the hands of one treasurer, i.e. that of the initiating municipality which carries on the work and pays the cost."

The initiating municipality has no authority to levy upon lands assessed for part of the cost of a drainage work, which are situate within the boundaries of a contributing municipality, and insofar as its by-law purports to do so it is ultra vires. In such case the contributing municipality is entitled to apply to the Referee to have the assessment declared invalid, even before the by-law has been finally passed. (*Broughton v. Tps. of Grey & Elma* (1897) 27 S.C.R. 495, at p. 509; *Walker v. Tp. of Ellice, McMahon J.*, July 17, 1894, cited at 26 O.R., at p. 707.)

It has been held by the Supreme Court (*Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1, at p. 35) that if a sum in the aggregate sufficient to complete a drainage work, in the manner authorized by the by-law, has been paid to the initiating municipality and has been misapplied by such municipality, it cannot afterwards by another by-law charge lands in a contributing municipality with a further assessment to replace the amount misapplied.

The fact that an appeal is pending in an action in which certain assessed landowners seek to have the drainage by-law under which the assessments were levied set aside, is not a sufficient cause for

granting a stay in another action brought by the initiating municipality against a contributing municipality to recover the amount assessed against it as its proportion of the cost of the work. (*Tp. of Tilbury W. v. Tp. of Romney* (1900) 19 P.R. 242.)

"Within four months."

It was said by Hagarty C.J., in delivering the judgment of a Divisional Court, (*Tp. of Chatham v. Tp. of Sombra* (1879) 44 U.C. Q.B. 305, at p. 309): "The award directs the \$700 to be paid by the defendants to plaintiffs. It was their duty to raise the money within the time limited. It does not appear to us that they are entitled to refuse payment until the work is done. . . . The Act does not expressly provide a remedy for the case urged by defendants, viz., that the works have been improperly or insufficiently carried out. If not executed at all we presume the money paid could be recovered back as on a total failure of consideration." This opinion was afterwards adopted by Meredith C.J. in his judgment, as member of a Divisional Court, in *Broughton v. Tps. of Grey & Elma* (1895) 26 O.R. 694, at p. 703. Rose and McMahon J.J., the other members of the Court, however, delivered conflicting opinions upon the question whether a contributory township was bound to pass a by-law to raise its estimated share of the cost of the drain within the period of four months, if it appeared that the initiating municipality had not first passed a valid by-law authorizing the undertaking of the work.

"Its proportion."

The late Mr. Justice Street, in delivering judgment in, *re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399, said, p. 404: "The aggregate of the sums charged against the various lands benefited in each municipality form the sum total charged against that municipality. If the municipality is dissatisfied with the sum total of the assessment, it may appeal to the drainage Referee to have it corrected, and when once finally settled, there remains only the task imposed on the Court of Revision of each township of settling disputes between the persons assessed, or who should have been assessed, as to the proportions in which the sum total charged against the township is to be borne *inter se*, for the aggregate cannot be changed."

"The sum that may be determined."

See notes to section 63.

"Court of Appeal."

The right of a contributing municipality to take a further appeal from the decision of the referee to the Court of Appeal against the amount assessed against it was granted first by The Drainage Act, 1894, (57 Vic. Ch. 56, sec. 62.)

"And such council shall hold the Court of Revision."

Provision for holding a Court of Revision in any contributing municipality was made first in 1889 by 52 Vic. Ch. 36, sec. 32. The absence of any such provision in the drainage clauses of the various municipal acts in force from time to time anterior to that date was apparently the cause of the conflict of opinion in the earlier cases upon the question whether individual assessments were

properly subject to review by the arbitrators (who fulfilled the duties of the Referee in this respect) or not. (*Re County of Essex v. Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 548; *Tp. of Thurston v. Tp. of Sidney* (1882) 1 O.R. 249, at p. 259; *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 352; *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, at p. 526.)

63. (1) The council of any municipality served as provided by section 61 may, within six weeks after such service upon its head, appeal to the Referee from the report, plans, specifications, assessments and estimates of the engineer or surveyor, by serving the head of the council from which they received the copy, and also the head of the council of any other municipality assessed by the engineer or surveyor with a written notice of appeal, setting forth therein the reasons for such appeal.

Appeal to referee from report of engineer.

(2) The reasons of appeal which shall be set out in such notice may be the following or any of them:—

Grounds of appeal

(a) Where the assessment against the appealing municipality exceeds \$1,000, or exceeds the estimated cost of the work in the initiating municipality,—

1. That the scheme of the drainage work as it affects the appealing municipality should be abandoned or modified, on grounds to be stated;
2. That such scheme does not provide for a sufficient outlet;
3. That the course of the drainage work, or any part thereof, should be altered;
4. That the drainage work should be carried to an outlet in the initiating municipality or elsewhere.

(b) In any case not otherwise provided for,—

1. That a petition has been received by the council of the appealing municipality, as provided by section 3 of this Act, from the majority of the owners within the area described in the petition, praying for the enlargement by the appealing municipality of any part of the drainage work lying within its limits, and thence to an outlet, and that the council is of opinion that such enlargement is desirable to afford drainage facilities for the area described in the petition;

2. That such appealing municipality objects to paying over its proportion of the cost of the work to the treasurer of the initiating municipality.
3. That the initiating municipality should not be permitted to do the work within the limits of the appealing municipality;
4. That the assessment against lands and roads within the limits of the appealing municipality and roads under its jurisdiction is illegal unjust or excessive. R.S.O. 1897, c. 226, s. 63.
- 7 Edw. VII., c. 42, s. 5.

"The council of any municipality may appeal."

This section sanctions an appeal by any municipality served with the engineer's report, upon any one or more of the enumerated grounds of appeal, and an appeal by such body against the total amount or proportion of the cost of the proposed drainage work assessed against the appellant municipality. It does not authorize an appeal by an individual landowner. (*Re Tp. of Aldborough & Tp. of Dunwich* (1904) 4 O.W.R. 159.)

The adjustment of assessments between individual landowners would seem to form no part of the duty of the referee under this section. These are matters for the after consideration of a Court of Revision. (*Re Jenkins & Tp. of Enniskillen* (1874) 25 O.R. 399, at p. 404.) The contrary view expressed by Gwynne J. in *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 352, antedates the amendment to section 62 which makes provision for holding Courts of Revision in contributing municipalities.

"Within six weeks."

It has been held that if the notice of appeal had been served after the expiration of the time limited without objection at the time, this irregularity would not be allowed to affect the validity of a subsequently rendered decision. (*Tps. of Thurlow v. Tp. of Sidney* (1881) 29 Gr. Chy. 497.)

"Any municipality served as provided by section 61."

It will be noted that by section 61 it is provided that service of the report, plans, &c., shall be made upon councils of non-initiating municipalities in two cases: (1) where the drain is continued into or through such municipality, (2) where lands or roads in such municipality are assessed without the drainage work being continued into it. It follows therefore that there is an appeal in either case, and that if the drain is carried into or through the appellant municipality the right of appeal exists irrespective of whether lands or roads within its limits have been assessed or not. (*Tps. of E. & N. Tilbury v. Tp. of Romney* (1895) 1 C. & S. 261.)

"May appeal to the referee."

The powers exercisable by a Referee in hearing and determining such appeals are set forth in section 89 of the Act.

It has been held by the Court of Appeal (*Tp. of Colchester N. v. Tp. of Gosfield N.* (1900) 27 A.R. 281), that while an appeal to a referee against an engineer's report is pending, the initiating municipality is not justified in referring the report back to the engineer for amendment, on the ground that at such time the referee alone has jurisdiction, with the consent of the engineer and upon hearing evidence, to amend it. (See sec. 89 (3).)

From the assessments."

In the early case of *re County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at pp. 540, 541, it was held by Wilmon C.J. that where several municipalities were assessed for the construction of a drainage work, any sums deducted on appeal to a joint board of arbitrators, from the assessments of one or more of the municipalities should be added to the assessments of the other interested municipalities in such proportions as the arbitrators should deem just, so that the total amount to be levied should remain the same as if there had been no appeal. This opinion was vigorously combatted by Gwynne J., in *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at pp. 341, 352, 355, 358.) It was held by the Supreme Court in this case that the intent of the Act is that the whole cost of a drainage work shall be borne by the initiating municipality less such sums as shall properly be chargeable under its provisions against lands or roads in adjoining municipalities, for special benefits conferred upon them by the construction of the work, and that if it appears on appeal that part or all of these assessments are unwarranted such sums should be deducted from the total assessment of the contributing municipality and are not to be added elsewhere.

The following citation is from the judgment of Gwynne J. in that case (*Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 355): "If any of those assessments should be removed for the reason that the lots on roads on which they were charged would not be benefited by the proposed work the sum total must of necessity be diminished accordingly. If the lots would not be benefited, but the roads would be, the assessment charged upon the lots must be removed; so if the roads would not be benefited, but the lots would be, the assessments charged upon the roads must be removed; and in neither case could the amount deducted in respect of the one be charged upon the other, either in justice or common sense or by reason of anything expressed in the Act."

The same question came up for decision before the Court of Appeal in 1891, in the case of *re Tp. of Romney & Tp. of Tilbury V.* (18 A.R. 477). The Court followed the decision of the Supreme Court in *Tp. of Dover v. Tp. of Chatham supra*. The view adopted in this case finds expression in the following citation from the judgment of Burton J.A. (p. 481): "The decision in *re Essex & Rochester*, 42 U.C.R. 523, has always been regarded with a good deal of doubt, but this is the first occasion on which this question has been brought before us for adjudication. It proceeded upon the idea that if the sum charged against one of several municipalities by the engineer for benefit was reduced, the other municipalities assessed for benefit were liable to have their amounts increased to make up the deficiency, in the same way as a readjustment becomes necessary in the event of any change being made in some one or more of the assessments in the Court of Revision, but this idea is, I think, manifestly erroneous; the benefit which one municipality receives cannot vary because a mistake has been made in the amount of benefit received by another."

It would seem to follow logically from the above decision that if in any case the whole or any part of the amounts assessed against any one or more contributing municipalities is struck off by the referee on appeal to him, on the ground that such assessment or so much of it as is struck off is not authorized by the Act, and in the result the total amount which can legally be levied by the initiating municipality for the construction of the work is insufficient for that purpose, unless the proposed work is abandoned, the initiating municipality would be obliged to have recourse to the powers conferred by section 66 of the Act and pass an amending by-law under its provisions to make up the deficiency.

"From the report."

Section 63 has primarily to do with appeals which are grounded on improper or excessive assessments. If the report is invalid because of failure to comply with statutory requirements the proceedings outlined by section 93 of the Act may be taken. In *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, Maclellan J.A. (p. 526) pointed out the extent of the remedy provided by this section as follows: "It is quite evident the Legislature never intended that unless appealed against an engineer's report should bind the corporation served with it, no matter how illegal or unauthorized its contents might be; as for example, where there was no petition in cases where petition is required, or where it appeared on the face of the report that he assessed territory not legally liable, or where any other illegality was apparent on the face of the report or assessment. The township when served with a document plainly illegal, might disregard it, and resist in the ordinary way any attempt to enforce it."

"The head of the council."

(See *Tp. of Malahide v. Tp. of Dereham* (1895) 1 C. & S. 243, cited above under section 61.)

"And also . . . any other municipality assessed by the engineer."

Provision for serving the notice of appeal upon all assessed municipalities other than the initiating municipality was made first on the consolidation of the drainage laws in 1864 (57 Vic. Ch. 56, sec. 63 (1)). Under the corresponding sections in force previously to this time, service upon the initiating municipality alone had been required. It was held by Wilson C.J. in, *re County of Essex & Tp. of Rochester*, (1878) (42 U.C.Q.B. 523, p. 540), that where several municipalities were assessed for contribution to the cost of a drainage work, and one of them appealed, there should be a joint arbitration between all the interested municipalities, and not an arbitration between only the contesting and the initiating municipalities. In 1891, the Court of Appeal overruled this decision (*re Tp. of Romney & Tp. of Tilbury W.*, (1891) 18 A.R. 477) and held that under such circumstances only the appealing township and the initiating township were proper parties to the arbitration, and that the other assessed townships had no right to be represented on such appeal. This case would now have to be read subject to the change in the statute as noted above. By requiring that notice of appeal should be served on all contributing municipalities the Legislature would seem to have intended that all assessed municipalities should be in a position to take action in respect to an appeal launched by any other municipality, possibly by launching a new appeal, if not entitled to intervene directly in any appeal of which it has received notice.

"Written notice of appeal."

If the appeal is instituted by a solicitor, the notice of appeal must set out the solicitor's name or firm and place of business. If the municipality proceeds without a solicitor the notice of appeal must set out an address for service, situate not more than two miles from the office of the clerk of the county court of the county in which the municipality initiating the drainage work is situate. See Rules 10 and 11 of the Rules of Practice. By Rule 6 it is provided that a notice of appeal will be properly served, if served upon a solicitor acting for the municipality, who accepts service and undertakes to enter an appearance. The style of cause in which the notice of appeal and other proceedings are to be entitled is set out in rule 9. Provisions governing the appearance of the defendant municipality are made by rules 13 and 14. By rule 5 it is provided that applications to a Referee shall be heard at the court house of the county or city in which the municipality initiating the drain is situate. Upon the hearing of an appeal under this section it is the duty of the initiating municipality to produce the original report, plans, assessments, &c., and the provisional by-law, and also to have present the engineer or surveyor for cross-examination.

By section 91 of the Act it is provided that a copy of the notice of appeal, together with an affidavit of service thereof shall, within the period limited for service of the notice of appeal, be filed in the office of the clerk of the county court of the county in which the drainage work was initiated.

"Setting forth therein the reasons for such appeal."

By sec. 89 (3) power is conferred upon the Referee, *inter alia*, to determine the validity of all reports "whether objections thereto have been stated as grounds of appeal to him or not." Quære whether this provision is intended to authorize him to waive the positive requirements of this section?

"That the scheme should be abandoned or modified."

Many reasons sufficient to require the abandonment or curtailment of a projected drainage scheme, within the limits of the appealing municipality will arise in different cases. The proposed drain may be too long, or of insufficient capacity, of no benefit, or of insufficient benefit to the lands and roads assessed, or even injurious in operation by carrying down and depositing water upon the assessed lands. See cases collected under section 21 (1) above.

"Does not provide a sufficient outlet."

As constructing a drainage work into or through the territory of an adjoining municipality is sanctioned by the Act only for the purpose of obtaining a sufficient outlet, where such an outlet cannot be found within the limits of the initiating municipality, failure to provide a proper outlet would constitute a fatal objection to the proposed scheme. (*Re Tp. of Raleigh & Tp. of Harwich* (1899) 26 A.R. 313, at p. 318; *Wigle v. Tps. of N. & S. Gosfield* (1902) 2 C. & S. 186, at p. 194; *Bruggink v. Thomas* (1900) 125 Mich. 9; and see cases cited under section 59 above.)

"That the course of the drainage work should be altered."

Extensive or important alterations in the course of a proposed drainage work, if adjudged necessary or proper, could not be proceeded with, unless and until resubmitted to the petitioners as

altered, and approved by them. The petitioners are entitled to have the proposed work done substantially as petitioned for or not at all. (*Re Musser & Tp. of Wainfleet* (1882) 40 U.C.Q.B. 457; *McCallish v. Tp. of Calabona* (1898) 25 A.R. 417, *re McDonald & Village of Alexandria* (1903) 2 O.W.R. 637, *re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 471, at p. 476; *Priest v. Tp. of Flos* (1901) 1 O.L.R. 78, at p. 85; *Smith v. Tp. of Raleigh* (1882) 3 O.R. 425, at p. 411; *Smith v. The State* (1888) 117 Ind. 167; *Racer v. Wingate* (1893) 138 Ind. 114.)

The route adopted should obviously be the one that will effect the required drainage by the shortest course, and that can be constructed in the least expensive manner and with the minimum damage to adjacent lands. But the honest judgment of the engineer, in determining between alternative routes of equal practicality should not be lightly interfered with. (*Stout v. Hosen Freeholders of Hopewell* (1855) 25 N.J.L.R. 202; *Benjoy v. Gar* (1894) 140 Ind. 292; *Willson v. Talley* (1895) 144 Ind. 74, at p. 80.)

"should be carried to an outlet in the initiating municipality."

If there is a sufficient outlet available in the initiating municipality within a reasonable distance of and in the natural course of the water, it should be conducted to it. Entry into a neighbouring municipality is justified by the Act only in cases where a practicable outlet is not available within the initiating municipality. See section 59 above and cases there cited.

"(b) In any case not otherwise provided for,"

The meaning of this and the previous sub-section (a) would seem to be that the objections enumerated in sub-section (a) may be taken advantage of by the appealing municipality only in case where the assessment against it exceeds \$1,000, or exceeds the estimated cost of the work in the initiating municipality, but that the objections specified in sub-section (b) may be taken in respect of any proposed drainage work, without regard to the amount assessed against the appealing municipality, or even if such municipality is not assessed at all, but is interested solely by reason of the drain being projected into or through its territory. (*Re Tp. of Aliborough & Tp. of Dunwich* (1904) 4 O.W.R. 159; *Tps. of E. & N. Tilbury v. Tp. of Romney* (1895) 1 C. & S. 261.)

"Objects to paying over."

If the proposed by-law and the proceedings on which it is based are regular and valid, it is the duty of a contributing municipality to raise and to pay over to the treasurer of the initiating municipality within the time limited by section 62, the sum charged against it in the engineer's report. (*Broughton v. Tps. of Grey & Elma* (1895) 26 O.R. 694, at p. 706.) It has been held that such a municipality is not entitled to refuse payment until the work has been done. (*Tp. of Chatham v. Tp. of Sombra* (1879) 44 U.C.Q.B. 105.) If the initiating municipality had already raised and misapplied a sum sufficient to complete the proposed drain, this would afford a valid objection to a second assessment. (*Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1.)

"The assessment is illegal, unjust or excessive."

To authorize an assessment in a contributing municipality the proposed work must confer substantial benefit upon the lands

or roads assessed. (*Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 341; *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 421, at p. 444; *re Tp. of Romney & Tp. of Tilbury W.* (1891) 18 A.R. 177; see extended citations from these cases under section 59 above.) If the amounts assessed against each road and each parcel of land in the appealing municipality charged with a portion of the cost of the proposed work are not shown separately the whole assessment is illegal. (*re County of Essex & Tp. of Rochester* (1878) U.C.Q.B. 123, at p. 537; *Tp. of Thurlow v. Tp. of Sidney* (1882) 1 O.R. 249, at p. 259; *Tp. of Dover v. Tp. of Chatham* (1886) 12 S.C.R. 321, at p. 351.)

This subsection would appear to make provision not for entry into the accuracy or propriety of individual assessments levied on lands or roads within the appealing municipality, but for examination and finding upon "the assessment" that is to say the total amount assessed against such municipality, to determine whether the whole or a portion of it was or was not illegal, unjust or excessive. The adjustment of individual assessments is a matter to be dealt with subsequently by a Court of Revision. (*Re Jenkinson & Tp. of Enniskillen* (1894) 25 O.R. 399, at p. 404.)

In a case where the existing drains were sufficient to relieve the lands assessed it was held by the Court of Appeal that the assessment for the proposed drain was "unjust" within the meaning of this subsection and it was therefore disallowed. (*Tp. of Aldborough v. Tp. of Dunwich* (1904) 4 O.W.R. 159; see also *re Hodgson & Tp. of Bosanquet* (1886) 11 O.R. 589, at pp. 590, 591.)

In *Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1, the Supreme Court decided that where a sum sufficient to complete the proposed drainage works had been paid to the initiating municipality and misapplied by it, that such municipality could not by a new by-law make an additional levy upon a contributing municipality in order to replace the sum misapplied.

64. (1) Upon an appeal under the preceding section the Referee shall hear and adjudicate upon all questions raised by the notice of appeal, and the reasons for such appeal stated therein as they may affect any municipality assessed for the drainage work; and he may give to any municipality through or into which the proposed work will be continued leave to enlarge the same, pursuant to petition in that behalf and according to the report, plans, specifications, assessments and estimates of an engineer appointed by the Referee for that purpose, and may make such order in the premises and as to costs already incurred, and as to costs of the appeal, as may seem just.

Powers of
referee on
appeal.

(2) The order of the Referee upon such appeal shall be subject to appeal to the Court of Appeal, as in other cases, and the decision of the Court of Appeal shall be final and conclusive as to all corporations affected thereby.

Appeal to
Court of
Appeal.

Abandonment
of work by
initiating
municipality

(3) The council of the initiating municipality may by resolution passed within thirty days after the decision of the Referee on the appeal to him or in case of an appeal therefrom after the hearing and determination thereof, abandon the proposed drainage work, subject to such terms as to costs and otherwise as to the Referee or the Court of Appeal may seem just. R.S.O. 1897, c. 226, s. 64.

"The Referee shall hear and adjudicate."

It has been held by the Court of Appeal that a Referee was not authorized by section 80 (1) of the Act or otherwise, on an appeal from an engineer's report to refer it back to him for amendment. (*Ops. of Adelaide & Warwick v. Tp. of Montreal* (1900) 27 A.R. 92.)

"To be to enlarge the same, pursuant to petition in that behalf."

Without a petition in accordance with the provisions of section 3 (1) of the Act, for the enlargement of the proposed work, all proceedings in that respect would be unauthorized.

"Appeal to the Court of Appeal."

By section 94 provision is made for an appeal from a Referee to the Court of Appeal in all applications and proceedings other than in those in which the decision of a Referee is final and conclusive. Section 92 provides that a by-law shall be amended so as to incorporate and give effect to the decision of a Referee, or of the Court of Appeal should an appeal from his decision be taken.

"Shall be final and conclusive."

(See judgment of Gwynne J. in *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495, at p. 511; see also notes to sec. 94 *infra*.)

ASSESSMENT FOR CUT OFF.

Benefit by
cut-off.

65. Any lands or roads from which the flow of surface water is by any drainage work cut off, may be assessed and charged for same by the engineer or surveyor of the municipality doing the work; and such assessment shall be classified and scheduled as benefit. R.S.O. 1897, c. 226, s. 65.

This section should be considered in connection with section 3 of the Act, where all other cases in which an assessment is justified are defined and classified.

AMENDING BY-LAW.

66. (1) Any by-law heretofore passed or which may be hereafter passed by the council of any municipality for the assessment upon the lands and roads liable to contribute for any drainage work and which has been acted upon by the doing of the work in whole or in part, but does not provide sufficient funds to complete the drainage work or the municipality's share of the cost thereof, or does not provide sufficient funds for the redemption of the debentures authorized to be issued thereunder as they become payable, may from time to time be amended by the council, and further debentures may be issued under the amending by-law in order to fully carry out the intention of the original by-law.

Amendment
of by-law
when insuffi-
cient funds
provided.

(2) Where in any such case lands and roads in another municipality are assessed for the drainage work, the council of the initiating municipality shall procure an engineer or surveyor to make an examination of the work and to report upon it with an estimate of the cost of completion for which sufficient funds have not been provided under the original by-law and shall serve the heads of the other municipalities as in the case of the original report, plans, specifications, assessments and estimates; and the council of any municipality so served shall have the same right of appeal to the Referee as to the improper expenditure or illegal or other application of the drainage money already raised and shall be subject to the same duty as to raising and paying over its share of the money to be raised, as, in the case of the original by-law, is provided by sections 62 and 63.

When lands
and roads
in another
Municipality
assessable.

(3) Any by-law already passed or hereafter passed for the assessment upon the lands and roads liable to contribute for any drainage work and acted upon by the completion of the work, which provides more than sufficient funds for the completion of or proper contribution towards the work or for the redemption of the debentures authorized to be issued thereunder as they become payable shall be amended, and if lands and roads in any other municipality are assessed for the drainage work the surplus money shall be divided

Amendment of
by-law which
provides more
than sufficient
funds and
distribution of
surplus.

pro rata among the contributing municipalities, and every such surplus until wholly paid out shall be applied by the council of the municipality *pro rata* according to the assessment in payment of the rates imposed by it for the work in each and every year after the completion of the work.

Amendment
of by-law not
providing
sufficient
funds.

Issuing debentures for completion of county drainage works commenced before 37 V. c. 56.

4. Any by-law passed prior to the 1st day of June, 1894, by the council of any county or union of counties for the assessment of the cost of any drainage work upon the lands and roads liable to contribute therefor which has been acted upon by the doing of the work in whole or in part and which does not provide sufficient funds to complete the drainage work, or the share of the said county or union of counties of the cost thereof, or does not provide sufficient funds for the redemption of the debentures issued under such by-law, as they become payable, may from time to time be amended by the council and further debentures may be issued under the amending by-law in order to fully carry out the intention of the original by-law; provided that every such drainage work shall, when fully completed, be maintained as provided in section 70 of this Act. R.S.O. 1897, c. 226, s. 66.

"But does not provide sufficient funds."

Boyd C., in delivering judgment in, *re Suskey & Tp. of Romney* (1892) 22 O.R. 664, at p. 665, said in this connection: "This section gives power to amend a drainage by-law when sufficient means have not been thereby provided for the completion of the work. I understand that to mean the completion of the drain, so as to make an efficient work, though there may be some deviations and variations, or even additions to the work as originally planned by the engineer. If, in the prosecution of the work, the necessity for such minor changes developes, not affecting the general character, but in order to the proper and efficient operation of the drain when finished, then these must be made or the whole outlay will be worthless."

In a case where a finding by the trial judge, that the amount levied under the initiating by-law was sufficient to complete the work as authorized by such by-law, was declared, on appeal, to be unwarranted by the evidence, his decree that the work should be completed at the cost of the defendant municipality, and not by an additional assessment levied upon the ratepayers previously assessed was set aside. (*Tp. of Sombra v. Tp. of Chatham*, (1892) 21 S.C.R. 305, p. 318.) And in the same case, when before the Court of Appeal (18 A.R. 252, at p. 254) Hagarty C.J. said: "I do not understand how the burden of extra or further expense

ould be borne by the defendant corporation and not by the ratepayers originally assessed for the cost. I think under the statute the area of improvement must bear the extra burden."

In a subsequent action tried between the same municipalities (*Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1) it was held that where a sum sufficient to complete the drainage work had been raised and misapplied, the initiating municipality was not authorized by this section to make an additional levy upon the lands assessed.

It was held by a Divisional Court in 1888 (*Green v. Tp. of Chatham*, 15 O.R. 506, p. 511), that this section authorized an additional levy to meet the cost of extra work found to be necessary for the efficient construction of a drain, but which had not been contemplated by the contract. On appeal this decision was reversed by the Court of Appeal (16 A.R. 4) on the ground that the contractor (the plaintiff) was bound under the terms of his contract, to complete the additional work for the price of which suit was entered.

Where the proposed drain was projected across the right of way of a railway, and a culvert was therefore necessary to make it an efficient work, by affording an outlet for the water and to prevent flooding, it was held by the Supreme Court that the cost of such culvert might be raised under the provisions of this section, and that a new by-law to cover its cost was not necessary. (*Canadian Pacific Ry. v. Tp. of Chatham* (1896) 25 S.C.R. 608, 613, 619.)

"Further debentures may be issued."

But if the first assessment does not prove sufficient to complete the proposed drainage work, in making a second or any subsequent assessment the previous assessments must be considered, and in no case should the aggregate amount of all assessments levied against a parcel of land for its share of the cost of construction exceed the benefits that will accrue to it by reason of the construction of the drain. (*Havana Tp. Drainage District v. Kelsey* (1887) 120 Ill. 482.) And in support of the general principle that the amount assessed should not exceed benefit conferred see *Tp. of Gosfield S. v. Tp. of Mersea* (1895) 1 C. & S. 269; *Tritipo v. Beaver* (1900) 155 Ind. 652, cited above under section 3 (1).

Subsection (2).

"Illegal . . . application of the drainage money already raised."

See *Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1, cited above under previous subsection.

If the non-completion of the drain has been due to the misapplication of the money previously raised, or a part of it, by the initiating municipality, the other interested municipalities would probably be entitled to an order calling upon the initiating municipality to complete the drain at its own cost. (*Smith v. Tp. of Raleigh* (1882) 3 O.R. 405; *Dillon v. Tp. of Raleigh* (1886) 13 A.R. 53, at p. 64; and see *Tp. of Sombra v. Tp. of Chatham* (1897) 28 S.C.R. 1.)

Subsection (3).

"And every such surplus . . . shall be applied."

The case of *Dillon v. Tp. of Raleigh* (1886) (13 A.R. 53, aff. 14 S.C.R. 739) was determined upon the following set of facts. After the suspension of work upon the drain in question, there

remained a surplus of some \$2,000 in the hands of the initiating municipality. Upon petition of the plaintiff and other contributors this was refunded ratably to them. The plaintiff subsequently brought this action, alleging that the drain was in an unfinished condition and to compel the municipality to complete it in accordance with the plans. He had contracted for a part of the work but had not fully carried out his contract. It was held that he was estopped from obtaining such relief; Osler J.A., who delivered the judgment of the Court of Appeal, saying (p. 67): "That was a fund to which the council might have resorted to complete the drain, if its non-completion had been complained of, but the plaintiff having been a party to procuring the council to distribute it on the assumption that it would not be necessary to resort to it for the purposes of the drain, and having assented to such distribution by receiving a share of the fund cannot now require the council to execute a work which they have no means to pay for."

Publication
of amending
by-laws.
Rev. Stat.
c. 40.

67. It shall be in the discretion of the council whether an amending by-law passed under any of the provisions of the preceding section shall be published or not, and the provisions of *The Municipal Drainage Aid Act* shall apply to any debentures issued under the authority of the said section, which have heretofore been or may hereafter be purchased by direction of the Lieutenant-Governor in Council. R.S.O. 1897, c. 226, s. 67

MAINTENANCE OF DRAINAGE WORK.

Maintenance
of work not
continued
into another
municipality

68. Any drainage work which has been heretofore constructed under a by-law of any municipality passed in pursuance of any Act relating to the construction of drainage work by local assessment, or which is hereafter constructed by a municipality under the provisions of this Act, and which is not continued into any other municipality, shall after the completion thereof be maintained by the initiating municipality,

- (a) If no lands or roads in any other municipality are assessed for the construction thereof, then at the expense of the lands and roads in the initiating municipality in any way assessed for such construction, according to the assessment of the engineer or surveyor in his report and assessment for the original construction of such drainage work, or,

- (b) If lands or roads in any other municipality, or roads between two or more municipalities are in any way assessed for the construction of such drainage work, then at the expense of all the lands and roads in any way assessed for such construction in the municipalities affected, and in the proportion determined by such report and assessment, or in appeal therefrom by the award of arbitrators or order of the Referee,—

Unless or until such assessment or proportion as the case may be, is varied of otherwise determined from time to time by the report and assessment of an engineer or surveyor for the maintenance of the drainage work, or in appeal therefrom by the award of arbitrators or order of the Referee. R.S.O. 1897 c. 226, s. 68.

Which has been heretofore or is hereafter constructed."

WORK NEVER COMPLETED.—It has been held by the Supreme Court that the provisions of this and the following sections apporportioning and regulating the duty of maintaining drainage works undertaken under the powers conferred by the Act have no application where the drain in question has never been completed. (*Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305, at p. 315.)

"Shall be maintained."

Maintenance is defined by section 2 (5) of the Act.

PUMPING MACHINERY.—It has been said by Maclellan J.A., in delivering the judgment of the Court of Appeal, in a case (*Bradley v. Tp. of Raleigh* (1905) 10 O.L.R. 201, at p. 204), where the maintenance of the drainage work in question included the operation of pumping machinery: "It follows also that the duty of maintenance imposed by section 68 includes not only the excavations, embankments and pumping machinery, but also the operation of that machinery."

WHAT CONSTITUTES REPAIR.—In *Begg v. Tp. of Southwold* (1884) (6 O.R. 184) the question was raised whether the authority to repair conferred by the Act extended to include deepening the drain in question. Evidence was given that the deepening was inconsiderable and accidental and Rose J. thereupon declined to quash the by-law. (See also upon this point *Weaver v. Templin* (1887) 113 Ind. 298.)

A party or municipality charged by a drainage Act with the duty of keeping a drain in repair, in the absence of any special enabling provision, is authorized only to keep the channel of the drain open and unobstructed to its full dimensions as to width and depth as set out in the specifications under which the drain was originally constructed, and has no power to change the location of the drain, or to widen or deepen it, or otherwise alter it in shape

er capacity. (*Weaver v. Templin* (1887) 113 Ind. 298; *Taylor v. Brown* (1890) 127 Ind. 293; *People v. McDougal* (1903) 205 Ill. 636; *Tp. of Merrill v. Harp* (1905) 141 Mich. 233.)

TOWNSHIP SUBDIVIDED AFTER CONSTRUCTION OF DRAIN.—In *Fairbairn v. Tp. of Sandwich South* (1899) 2 C. & S. 133, the Court of Appeal were called upon to place the responsibility for damages suffered by reason of the non-repair of that part of a drain which lay within the limits of the defendant municipality. The drain had been constructed by a former township, whose territory was afterwards subdivided by the Legislature into two separate municipalities, of which the defendant township was one. The Court held that the defendants were liable for the repair of so much of the drain as was contained within their boundaries. See, however, *Wigle v. Tp. of S. Gosfield* (1901) 1 O.L.R. 519, and *Wigle v. Tps. of N. & S. Gosfield* (1904) 7 O.L.R. 302, cited below under sec. 93.

"In the proportion determined by such report."

By section 14 of the Act the engineer is required to report, where lands in any other than the initiating municipality are assessed, what proportion of the cost of maintenance shall be borne by each of the municipalities interested.

"Until such proportion is varied."

By section 72 of the Act provision is made for any municipality whose duty it is to maintain part of a drainage work, taking action to have the proportions of assessment for maintenance varied, upon the report of an engineer appointed to examine the existing condition of the work. Upon such examination the engineer may assess for maintenance lands which were not originally assessed for construction, if they have subsequently derived benefit from the operation of the drain. Of the conflicting opinions expressed by the judges of the Court of Appeal upon this point in the earlier case of *re Clark & Tp. of Howard* (1888) (16 A.R. 72) that held by Hagarty C.J.O. (p. 77) is embodied in that section.

"By the award of arbitrators."

This would appear to be a solecism. By section 99 the powers possessed by arbitrators under former enactments relating to drainage works are now conferred upon the referees.

Maintenance
of drainage
work passing
into another
municipality

69. Any drainage work heretofore constructed under a by-law of a municipality, passed in pursuance of any Act relating to the construction of any drainage work by local assessment, or hereafter constructed under the provisions of this Act, which is continued into or through more than one municipality, or which is commenced by the initiating municipality on a road allowance adjoining such municipality and is continued thence into the lands of any other municipality shall after the completion thereof be maintained by the initiating municipality from the point of com-

mencement of the drainage work in the municipality or upon such road allowance to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality and by such last mentioned municipality and by every other municipality through or into which the drainage work is continued from the point at which the drainage work crosses the boundary line between a road allowance and lands in the municipality to an outlet in the municipality or on a road allowance adjoining the municipality or to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, as the case may be, at the expense of the lands and roads in any way assessed for the construction thereof and in the proportion determined by the engineer or surveyor in his report and assessment for the original construction or in appeal therefrom by the award of arbitrators or order of the Referee, unless and until, in the case of each municipality, such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or in appeal therefrom by the award of arbitrators or order of the Referee. R.S.O. 1897, c. 226, s. 69.

"After the completion thereof."

This section has no application to a case where the drain in question was never completed. (*Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305, at p. 315.)

"Shall be maintained."

Osler J.A., in delivering the judgment of the Court of Appeal in *Dillon v. Tp. of Raleigh* (1886) 13 A.R. 53, at p. 64, said, in reference to this and the adjoining sections regulating the duty of maintenance: "The effect of these sections would appear to be that a municipality has no power to construct or to repair a drain, under the drainage clauses of the Act, except in the manner and by resorting to the means there provided for so doing."

"By such last mentioned municipality."

It was held by the Court of Appeal in the recent case of *re Tp. of Camden & Town of Dresden* (1923) (2 O.W.R. 200), affirming the decision of Drainage Referee Rankin in the same case (1902) 2 O.C. & S. 308, that a non-initiating municipality, upon which, under the obligation imposed by this section, the duty of keeping that part of the drain within its own boundaries, devolved, might repair

a culvert across one of its highways, but required chiefly as an outlet for the drain in question, upon taking the appropriate proceedings defined by section 71, and that the cost of such repairs was properly assessed largely against the initiating municipality.

And see *Tp. of Chatham v. Tp. of Dover* (1904) 8 O.L.R. 132, in which case the repairs in question were to be made to a bridge which formed part of the drainage scheme.

In delivering the judgment of the Privy Council, in *Williams v. Tp. of Raleigh* (1895) A.C. 540, Lord McNaughten said (p. 547): "The Municipal Act (i.e. now the Municipal Drainage Act) in express terms imposes on every municipality the duty of preserving maintaining and keeping in repair drainage works within its own limits, and that whether the drainage work is a work constructed by the municipality, or a work constructed by the Government before the municipality was incorporated."

"At the expense of the lands assessed for the construction."

That is to say while the duty of repairing so much of an inter-municipal drain as is out of repair within its municipal limits is in each case imposed by the Act upon the municipality in which that part is situate, the burden of paying for such repairs is to be borne by the lands and roads assessed for the construction of the drain, in the proportions that they are rendered liable for maintenance by the original report of the engineer, unless and until such report is varied on appeal or a reassessment is made as provided by section 72.

"Until . . . such provision for maintenance is varied."

In *re Tp. of Mersea & Tp. of Rochester* (1895) 22 A.R. 110, Hagarty C.J.O., said, in his judgment (p. 114): "I agree with the learned Referee, that the county engineer had no authority to prescribe (apparently for all time to come) the liability of named lands in the several townships. It would be most inconvenient and unwise to infer the existence of such a power when not expressly given. The circumstances of the whole drainage system and maintenance may be changed in the course of a number of years."

Re Tp. of Mersea & Tp. of Rochester et al. (1895), 22 A.R. 110, was a dispute between three adjoining townships as to their respective shares of the cost of repairing a drainage work in which all three were interested. The drainage work had been constructed originally by the County of Essex. The decision of the Court of Appeal in this case upon the question of liability to repair was based upon the law as it stood prior to the consolidation of 1894. The Court held that each township must keep in repair that portion of the drain which was within its own boundaries at its own expense and could not call upon lands assessed for construction in an adjoining township for contribution.

The cases determining under what circumstances and to what extent the assessments for maintenance may be varied from the proportion fixed by the engineer in the initial report are collected under sections 71 and 72 below.

"By order of the Referee."

See *Tp. of Dover v. Tp. of Chatham* (1904) 8 O.L.R. 132, cited under section 71 below.

70. (1) Where a drainage work constructed before the 5th day of May, 1894, under the provisions of *The Ontario Drainage Act* or any Act in amendment thereof or under a by-law passed by a county council does not extend beyond the limits of one municipality, such drainage work shall be maintained and kept in repair by such municipality at the expense of the lands and roads in any way liable to assessment under the provisions of this Act.

Maintenance of drains constructed by government or under county by-laws.

Rev. Stat. 1887, c. 36.

(2) Any drainage work constructed before the 5th day of May, 1894, under *The Ontario Drainage Act* or any Act in amendment thereof or under a by-law passed by a county council, which continues from the municipality in which the drainage work commences into or through one or more other municipalities, shall be maintained and kept in repair by the municipality in which the drainage work commences, from the point of commencement to the point at which the drainage work crosses the boundary line between any road allowance and lands in another municipality, or to the outlet on such road allowance as the case may be, and by every other municipality through or into which the drainage work is continued, from the point at which the same crosses the boundary line between any road allowance and lands in the municipality and enters upon such lands to an outlet in the municipality, or on a road allowance adjoining the municipality, or to the point at which the drainage work crosses the boundary line between any road allowance and lands in an adjoining municipality, as the case may be, at the expense of the lands and roads in any way assessed for the construction thereof, and in the proportion determined by the assessors or engineer or surveyor in their assessment roll or report as the case may be, for construction, or in appeal therefrom by the award of arbitrators or order of the Referee, unless and until in the case of each municipality such provision for maintenance is varied or otherwise determined by an engineer or surveyor in his report and assessment for the maintenance of the drainage work or in appeal therefrom by the award of arbitrators or order of the Referee.

When such drains extend into another municipality.
Rev. Stat. 1887, c. 3.

(3) A drainage work which commences on a road allowance between two municipalities shall, for the purposes of this section, be deemed to commence in the municipality next adjoining that half of the road allowance upon which the drainage work is begun.

R.S.O. 1897, c. 226, s. 70.

The Ontario Drainage Act.

This Act passed out of existence in 1897. (See R.S.O. 1897, Vol. 2, Sch. B., p. 3670.) Since then no authority exists for undertaking any new drainage work under its provisions. A table of statutes showing the history of this enactment will be found above.

In *Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495 Gwynne J. said, at p. 522: "The Legislature, by the language used in sec. 70, seems to shew a plain intention of limiting the application of the Act to works constructed under the Ontario Drainage Act, to the provisions of that section, namely, to cases of repair and maintenance alone."

See *Williams v. Tp. of Kaleigh* (1893) A.C. 540, at p. 547, cited above under section 69.

shall be maintained by the municipality in which the drainage work commences

The question arose in the recent case of *re Tp. of Rochester v. Tp. of Mersca* (1901) (2 O.L.R. 435) whether a municipality which had failed to keep a drain in repair within its own limits, under the obligation imposed by this sub-section, must put the same in a proper condition of repair, before initiating proceedings for improving or extending the drain as authorized by section 75. Lister J. A. expressed the opinion (p. 441): "that both classes of work might be authorized and provided for in a single by-law. In such case the engineer would estimate separately the cost of the two classes of work, and assess the cost thereof against the lands properly chargeable therewith, distinguishing the cost of repairation from that for work to be done under section 75." Moss J.A. gave expression to a like opinion. (See p. 440.)

Service of by-law on municipality in which lands are assessed without drain being continued into it

71. (1) The council of any municipality undertaking the repair of any drainage work under sections 68, 69 or 70 of this Act, shall, before commencing the repairs, serve upon the head of any municipality liable to contribute any portion of the cost of such repairs under the provisions of this Act, a certified copy of the by-law for undertaking the repairs, as the same is provisionally adopted, which by-law shall recite the description, extent, and estimated cost of the work to be done and the amount to be contributed therefor by each municipality affected by the drainage work; and the council of any municipality so served

may, within thirty days thereafter, appeal from such by-law to the Referee on the ground that the amount assessed against lands and roads in such municipality is excessive or that the work provided for in the by-law is unnecessary, or that such drainage work has never been completed through the default or neglect of the municipality whose duty it was to do the work, in the manner provided in the case of the construction of the drainage work; and the Referee on such appeal may alter, amend or confirm such by-law, or may direct that the same shall not be passed as to him may seem just. The order of the Referee upon such appeal shall be subject to appeal of the Court of Appeal for Ontario, and the decision of the Court of Appeal for Ontario shall be final and conclusive as to all corporations affected thereby. R.S.O. 1897, c. 226, s. 71(1); 1 Edw. VII., c. 30, s. 1.

Appeal

(2) The council of every municipality served with the provisional by-law shall, within four months after such service, pass a by-law to raise, and shall, within said period of four months, raise and pay over to the treasurer of the initiating municipality the amount assessed against lands and roads in the municipality, as stated in the provisional by-law or as settled on appeal therefrom by the order or the Referee. R.S.O. 1897, c. 226, s. 71 (2).

Council served to raise and pay over the amount required.

"Serve a certified copy of the by-law."

If it is proposed to vary the proportions of assessment for maintenance, or to assess lands for maintenance not previously assessed for construction the preliminary steps outlined in section 72 must be taken before the by-law is introduced.

"Within thirty days."

See *Tp. of Thurlow v. Tp. of Sidney* (1881) (29 Gr. Chy. 497) cited under section 63 above.

"That the amount assessed is excessive."

Refer to cases cited under similar heading, section 63 (b) 4 above, and under section 59.

"That such drainage work has never been completed"

(*Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305, at p. 315, cited under section 68 ante.)

"In the manner provided."

The procedure to be adopted on an appeal to the Referee is set out in section 63.

The Recorder, who must be appointed by the Council.

Chief Justice A. in delivering the judgment of the Court of Appeal in a case arising under this section (*l p. v. Durr v. Ipswich Corporation* 1844 S.O.R. 132 p. 134) said as follows: "Having regard to the concluding words of sec. 69 and to the provisions of sec. 72 which expressly provide for the case of varying the assessment at any time, I think, have been intended to give the referee power where no proceedings are being taken under sec. 71 to reach practically the same result as would have followed if the proceedings had been taken under sec. 72. In proceedings under section 71 it seems to me that it must be continued to seeing that the original *pro rata* proportion is maintained, that the work proposed to be done is necessary, or that the proposed assessment cannot be maintained, because the original work has not been completed owing to the neglect of the municipality whose duty it was to do the work." The Court held in agreement with the above statement, that as the proceedings authorized by section 72 to vary the original *pro rata* assessments for maintenance had not been taken, the provisions of section 69 governed, with the result that the referee had no power to alter the assessments as he had done.

In an earlier case (*l p. v. Haverhill v. Ipswich Municipal Council* 1841 C. & S. 211) determined by Drainage Referee Rankin, the assessments for repair charged against the plaintiff township were reduced by the referee on evidence given, and the amount deducted was added *pro rata* to the assessments of the lands and roads liable therefor in the defendant township. This would appear in view of the above decision to have been an unauthorized proceeding, unless advantage had been taken of the provisions of section 72.

Within four months."

See *l p. v. Whitham v. Ipswich Municipal Council* (1879) 14 U.C.Q.B. 325 at p. 328, cited above under section 62. Also *Broughton v. Ipswich Municipal Council* (1895) 20 O.R. 601, at p. 703. In this latter case the three judges of a Divisional Court differed in opinion on the question whether a contributory township was bound to pass a by-law and raise its estimated share of the cost of the proposed repairs, where it appeared that the by-law authorizing the work was invalid. It does not appear whether this point arose on the appeal of this case to the Court of Appeal (23 A.R. 601) the members of which divided equally upon the question whether the appeal should be allowed or not. In the Supreme Court (27 S.C.R. 455) the case was determined on the ground that jurisdiction to proceed with the proposed work was lacking.

Shall be assessed and pay over."

See cases collected under same phrase, section 62.

VARYING ASSESSMENT.

72. (1) The council of any municipality liable for the maintenance of any drainage work may from time to time as the same requires vary the proportions of assessment for maintenance, on the report and assessment of an engineer appointed by the council to examine and report on the condition of the work

Varying
assessment
for maintenance

or the portion thereof, as the case may be, which it is the duty of the municipality as aforesaid to maintain and on the liability to contribute of lands and roads which were not assessed for construction, and have become liable to assessment under this Act; and the engineer or surveyor may in his report upon such repairs assess lands and roads in the municipality undertaking the repairs and in any other municipality from which water flows through the drainage work into the municipality undertaking the repairs; but he shall not, except after leave given by the Referee on an application of which notice has been given to the head of every municipality affected, assess for such repairs any lands or roads or roads lying in any municipality into which water flows through the drainage works from the municipality undertaking the repairs.

(2) The proceedings upon such report and assessment shall be the same, as nearly as may be, as upon the report for the construction of the drainage work. Proceedings on report of engineer.

(3) Any council served with a copy of such report and assessment may appeal from the finding of the engineer as to the proportion of the cost of the work for which the municipality is liable to the Referee, and the proceedings on such appeal shall be the same as in other cases of appeals to the Referee under this Act. Appeal from report of engineer.

(4) Any owner of lands and any ratepayer in the municipality as to roads assessed for such repairs may appeal from such assessment in the manner provided in the case of the construction of the drainage work, and the council of every municipality affected by the report of the engineer or surveyor made under this section shall appoint a Court of Revision for the trial of any appeals in the manner hereinbefore provided. Appeal to Court of Revision.
R.S.O. 1897, c. 226, s. 72.

"On the liability to contribute of lands and roads which were not assessed for construction."

The object of this provision is well set out in the words of Darling J. in the case of *Raundenbush v. Mitchell* (1900) (154 Ind. 610, at p. 619), in considering the right to assess for maintenance the lands originally assessed for construction under a drainage statute of that State: "It might easily result from natural causes or from artificial changes in the condition of the lands in the vicinity of a public drain that tracts not originally benefited by the construction of the ditch, nor in any way dependent upon it for drainage, would, afterwards, derive valuable advantages from its

maintenance. The obstruction of natural waterways, or a change in the course of creeks or rivers, the drainage and reclamation of large areas of marsh lands, the cutting down of forests, and other alterations in the condition or use of neighbouring real estate might effect such change. On the other hand lands originally assessed for the construction of a drain might cease to be benefited and, therefore, become exempt from allotments for repairs, or if liable, responsible only in a reduced ratio." The Court held in this case that an assessment for repairs must be based upon benefit received by the land assessed and apportioned accordingly, and that such assessments were not to be apportioned in the same ratio as the original assessments for construction. In *Parke County Coal Co. v. Campbell* (1894) 140 Ind. 28, at p. 34, a similar decision was rendered. For an expression of opinion similar to that contained in the above citation see *re Tp. of Mersea & Tp. of Rochester* (1895) 22 A.R. 110, at p. 114, cited above under section 69.

"And in any other municipality from which water flows."

That is to say an assessment may be made against lands situate in an adjoining higher municipality connected artificially with the drain which it is proposed to repair under such circumstances as would oblige them to contribute to the work of original construction, in respect of any of the matters for which an assessment can be made under section 3 of the Act.

But he shall not, except after leave given, &c."

"The case the latter part of the section provides for is that if one municipality assessing for repairs done within its own borders, upon a drain it is liable to maintain, lands of another municipality into which water flows from the municipality undertaking the repairs." Osler J.A. in delivering the judgment of the Court of Appeal in *re Stonehouse and Tp. of Plympton* (1897) 24 A.R. 416, p. 423.

Power to
compel
repairs by
mandamus

73. Any municipality neglecting or refusing to maintain any drainage work as aforesaid, upon reasonable notice in writing from any person or municipality interested therein who or whose property is injuriously affected by the condition of the drainage work, shall be compellable, by mandamus, issued by the Referee or other Court of competent jurisdiction, to maintain the work, unless the notice is set aside or the work required thereby is varied as hereinafter provided, and shall also be liable in pecuniary damages to any person or municipality who or whose property is injuriously affected by reason of such neglect or refusal.

Proviso.

(a) Provided nevertheless, that any municipality, after receiving such notice, may, within fourteen days thereafter, apply to the Referee to set aside the notice; such application may be made upon four days notice to the party

who gave the notice to the municipality, and the Referee shall, after hearing the parties and any witnesses that may be called or other evidence, adjudicate upon the questions in issue, confirm or set aside the notice, as to him may seem proper, or order that the said work of maintenance shall be done wholly or in part; and the costs of and concerning the said motion shall be in the discretion of the Referee except as hereinafter mentioned, and may be taxed upon the County or Division Court scale, as the Referee may direct.

- (b) Should the Referee find that the notice to the municipality was given maliciously or vexatiously, or without any just cause, or to remove an obstruction which under this Act it was the duty of the party giving the notice to remove, he shall, notwithstanding anything hereinbefore contained, order the costs to be paid by the party giving the notice. Giving notice to repair maliciously.
- (c) Any costs which the municipality may be called upon to pay, by reason of any proceedings in these clauses mentioned, shall be paid out of its general funds. Costs to be paid out of general funds.
- (d) Any party to such proceedings may, except on a question of costs, by leave of the Referee or special leave of the Court of Appeal or a Judge thereof, appeal to the Court of Appeal from the decision or judgment of the Referee; and the proceedings in and about such appeal shall be the same, as nearly as may be, as upon an appeal from the decision or judgment of the Referee as is hereafter provided. Appeal to Court of Appeal.
- (e) Upon any such appeal the Court may determine whether a mandamus shall issue or otherwise, and may make such order as may seem just. Powers of Court of Appeal.

Thirty days' notice to be given.

- (f) A mandamus against the municipality shall not, in any case, be moved for until after the lapse of thirty days from the date of the service of the notice upon the municipality. R.S.O. 1897, c. 226, s. 73.

"To maintain."

Maintenance is defined by section 2 (5) of the Act to mean "the preservation and keeping in repair of a drainage work."

It has been said by Sir George Jessel M.R. (*Sevenoaks & Ct. Ry. v. London & Ct. Ry.* (1879) 11 Chy. Div. 625, at p. 634): "It is very difficult to define what works of maintenance are. It is a very large term and useful or reasonable ameliorations are not excluded by it." In *Pittsburgh & Ct. Ry. v. City of Pittsburgh* (1875) 80 Pa. 72, at p. 76, the Court said: "Repair means to restore to sound or good condition after injury or partial destruction." But repair does not mean to restore something that has been destroyed and no longer exists. (*McCormick v. Tp. of Pelee* (1890) 20 O.R. 288; *Cummings v. Town of Dundas* (1907) 13 O.L.R. 384, at p. 393.) See further upon this point the cases cited under sec. 68 above.

In delivering the judgment of a Divisional Court in *Cummings v. Town of Dundas* *supra*, an action arising out of the non-repair of a highway, Mulock C.J. said: "It is impossible to define the extent of damage necessary in order to take the case out of one of non-repair. In each case it must be one of degree; and it seems to me that if the damage can be effectually repaired at a cost reasonably within the means of the municipality, and that the expenditure seems justified by the public benefit to accrue from it, the case may properly be regarded as one of non-repair, and that the municipality is not relieved from liability."

"As aforesaid."

The remedy granted by this section is available against any municipality upon which the burden of maintaining a drainage work after its completion is cast under any of the provisions of sections 68 to 70 inclusive of the Act.

"Upon reasonable notice in writing."

It has been held by a series of decisions, the combined authority of which would appear to be unassailable, that the defined requirement of a previous notice in writing given the municipality concerned, a reasonable time before action brought, applies only to cases where a mandamus is sought, and that the absence of such notice does not operate as a bar to an action for damages.

In 1892, Mr. Justice Gwynne, in delivering the judgment of a majority of the Supreme Court in a case (*Tp. of Sombra v. Tp. of Chatham*, 21 S.C.R. 305), where it was held that the drain in question had never been fully completed, said (p. 311): "In such an action (i.e. for damages) the occurrence of damage from such neglect after such notice may be taken as conclusive evidence of negligence, but what in cases where no want of repair is apparent to any person interested, and who may become injuriously affected, and consequently no notice is given under the section, but the municipality with full knowledge or means of knowledge, that a

drain which they are bound to maintain has been suffered to fall into a state of disrepair omit negligently to make necessary repairs and negligently fail to discharge their duty of maintaining the work in an efficient state of repair, and damages result to individuals by reason of such negligence? In my opinion the section in question has no reference to any such case; for such damage sustained by neglect to discharge a statutory duty any person injured has his remedy by action at common law, which the section in question does not, as it appears to me, purport to restrict or affect in any manner."

In the following year the opinion of Gwynne J. cited above was amply confirmed by the judgment of the Judicial Committee of the Privy Council on the appeal of *Williams v. Tp. of Raleigh* (1893) A.C. 540. The decision upon this point sufficiently appears from the following citation from the judgment of the Court (p. 548) delivered by Lord McNaughten: "It seems to their Lordships most reasonable that no action should be brought for a mandamus to compel a municipality to execute repairs, until after notice in writing has been given to them. But it would be very unreasonable to enact that a municipality is bound to repair all drainage works within its limits, and at the same time to say that a municipality is not to be liable for any breach of that statutory duty, however gross the breach might be, unless previous notice in writing is given. Damage by floods for the most part is sudden and unexpected. A man's property may be entirely ruined before it is possible for him to give any notice to the municipality, and yet if the contention of the appellant is correct he would be left without any remedy, for there is no provision for arbitration, in the statute, relating to such a case. Their Lordships do not think that the language is so clear as to take away the right to bring an action without notice—a right to which a person injured as the plaintiffs in this case have been injured would prima facie be entitled."

In the following cases determined by the Courts of this Province the construction of this section adopted in *Williams v. Tp. of Raleigh* is approved and followed. *Stephens v. Tp. of Moore* (1898) 25 A.R. 42, at p. 46; *Fairbairn v. Tp. of S. Sandwich* (1899) 2 C. & S. 135, judgment of Court of Appeal, p. 139; *Crawford v. Tp. of Ellice* (1899) 26 A.R. 484; *McKim v. Tp. of E. Luther* (1901) 1 O.L.R. 89.

In the case of *Crysler v. Tp. of Sarnia* (1887) 15 O.R. 180, it was held by a Divisional Court, in conflict with the authorities cited above, that a written notice was a necessary statutory prerequisite to an action claiming damages, due to non-repair. In the recent case of *Rayfield v. Tp. of Amaranth* (1903) 2 O.W.R. 69, decided by the Court of Appeal, the same view is supported with much cogency by Mr. Justice Garrow. The weight of authority, however, would seem to be altogether upon the other side.

If a drainage work has never been completed, the statute does not afford any protection to the municipality which maintains it. For damage suffered under such circumstances the plaintiff has an action apart from the statute. This would appear to be in effect the decision of the Supreme Court in *Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305.

REASONABLE NOTICE REQUIRED.—The notice to be given the municipality in default must be reasonable notice, that is to say sufficient time must be allowed it after service of the notice to make preparation for and to undertake the required repairs, before the

applicant is entitled to apply for a mandamus. It was held by the Court of Appeal in *Tp. of Sombra v. Tp. of Chatham* (1891) (18 A.R. 252, pp. 256, 258, 267) that a fortnight was not a reasonable time to allow the defendant municipality to make preparation for repairing the drain in question. In 1894 the length of notice required by the Act was extended from 14 to 30 days. See sub-section (f) below.

THE NOTICE MUST FURNISH PARTICULARS OF RELIEF SOUGHT.—The written notice in order to conform to the requirements of the statute must specify in what respect the drainage work is out of repair, and call upon the municipality to which it is addressed to remedy the matter complained of. In delivering the judgment of the Court of Appeal in *Crawford v. Tp. of Ellice* (1899) 26 A.R. 484, Lister J. said, in this connection (p. 489) : "It seems to me that what the statute requires is an unconditional notice or demand to repair under its provisions, given or made by a person interested in the drain, and who or whose property is injuriously affected by its condition. The notice or demand ought to be for the performance of that which the plaintiff afterwards seeks to compel by mandamus; in short, it ought to be so clear and precise in its terms that the municipality might be able to ascertain whether the complaint was well founded or frivolous, and it ought to be a notice which the municipality would be justified in treating as a notice under section 73 for the purpose of an application to the referee under sub-sec. (a)." The Court held in this case that a letter calling attention to defects in the drain, and suggesting that certain steps be taken to remedy them, but not demanding that the municipality should do any specific work was not a sufficient notice to support an application for a mandamus. In the same case (p. 490) it was determined that the notice of claim by which the proceedings were instituted, as required by section 93 (2) of the Act, could not be treated as a notification to repair under this section. In the recent case of *McKim v. Tp. of E. Luther* (1901) (1 O.L.R. 89) the Court of Appeal were called upon to determine whether a letter written by the plaintiff's solicitor to the defendants was a sufficient notice to fulfil the requirements of this section. The letter stated that the plaintiff's lands had been injured by overflow from the drain in question, and requested the council to construct such additional drainage facilities as would prevent a recurrence of the damage. The Court decided that this was insufficient. Lister J.A. who delivered the judgment of the Court (p. 94), placed it upon the ground that : "The demand was not that the defendants should repair the drain, but that they should construct and maintain a drainage work required to relieve her lands." The Court also held that an objection to the sufficiency of the notice submitted might be taken at any stage of the action, even although lack of notice had not been pleaded.

Upon the point that the written notice should particularize the nature of the required repairs see also *Tp. of Sombra v. Tp. of Chatham* (1891) 18 A.R. 252, at p. 267.

It was said by Osler J.A. in *Tp. of Sombra v. Tp. of Chatham* (1891) 18 A.R. 252, at p. 260, that if the plaintiff's injury resulted from negligence in the original construction of the drain this section did not apply, and hence notice need not be given.

It was held by Street J. in a case (*re McCormick & Tp. of Howard* (1886) 18 O.R. 260), arising under section 21 of the Act, that the notice of intention to apply to have a by-law quashed, provided for by that section, must be given by or on behalf of the

designated party who afterwards prosecutes the application; and that a solicitor's letter purporting to be written on behalf of a named party "and others" was not sufficient to support an application by anyone other than the person named in it.

"From any person or municipality interested therein."

Any person who has been assessed for the construction or for the repair of the drain which is out of repair may apply for a mandamus to enforce the doing of the necessary work. And any municipality in which lands have been assessed, or into or across which the drain has been constructed, may under like circumstances prosecute a similar application. (*Tps. of E. & N. Tilbury v. Tp. of Romney* (1895) 1 C. & S. 261.) This right exists independently of any proof of special damage resulting from the condition of non-repair. (*Stephens v. Tp. of Moore* (1898) 25 A.R. 42, at p. 45; *Crawford v. Tp. of Ellice* (1899) 26 A.R. 484, at p. 488). Persons not included in the above classes who suffer damage through the non-repair of a drainage work are entitled to sue for and recover judgment for the damage sustained, but are not entitled to call upon the municipality responsible to put the drain in repair.

"Who or whose property is injuriously affected."

It has been held by the Court of Appeal that an assessed ratepayer is "injuriously affected" within the meaning of this section and entitled to a mandamus if the drain be out of repair, although no actual pecuniary damage has been proved. Maclellan J.A., in his judgment in *Stephens v. Tp. of Moore* (1898) 25 A.R. 42, at p. 45, said in this connection: "The plaintiff is entitled to have his land as free from water as that drain, in a proper state of repair would make it, whether his land is under cultivation, or in a state of nature. If for want of such repair water stands upon his land or any part of it, either in greater quantity or for a longer time than it otherwise would, that is something he is not obliged to submit to, even although it has done him no actual pecuniary damage. It is an injury to his right. For it is his right to have it otherwise." Osler J.A. in the same case expressed his opinion as follows (p. 43): "The claim for a mandamus is in a different position. I do not think it is necessarily bound up with or dependent upon proof that actual damage has been sustained by means of the non-repair. It is the duty of the defendants to keep the drain in repair. The plaintiff is not bound to wait until actual damage has been caused by their default, nor to sue for both modes of relief. His right is to have the drain he has paid for kept in a reasonable state of repair. It was made for the purpose of draining his property and that of others interested in it, and if the defendants refuse or neglect to repair it, I do not think they can escape from their obligation, or be excused from performing it, short of proof, that, even if it were repaired, it would, from changes in the surrounding conditions, be entirely useless to the plaintiff's property." In the later case of *Crawford v. Tp. of Ellice* (1889) (26 A.R. 484, at p. 488), Lister J. A., in delivering the judgment of the Court, approved of and adopted the law as laid down in *Stephens v. Tp. of Moore*.

"By mandamus."

In *Tp. of Sombra v. Tp. of Chatham* (1891) (21 S.C.R. 305, 318) it was held by a majority of the Supreme Court that the remedy by mandamus afforded by this section had no application in a case where the drainage work complained of had never been

fully completed, but that in such case the Court might grant a mandamus under the powers conferred by the Judicature Act.

The right of an assessed ratepayer to a mandamus does not depend upon proof of damage sustained, but upon his establishing that the drain is out of repair. (*Stephens v. Tp. of Moore* (1898) 25 A.R. 42, p. p. 43, 45; *Crawford v. Tp. of Ellice* (1899) 26 A.R. 484, at pp. 488; *McKenzie v. Tp. of W. Flamborough* (1899) 26 A.R. 198, at p. 203; *O'Hare v. Tp. of Richmond* (1904) 4 O.W.R. 178; *Peliter v. Tp. of Dover E.* (1897) 1 C. & S. 323.)

A mandamus will not be granted under circumstances which would render the order of the Court nugatory or useless; as where the desired repairs have at the time of hearing already been undertaken. (*Northwood v. Tp. of Raleigh* (1883) 3 O.R. 347) or completed. (*McKenzie v. Tp. of W. Flamborough* (1899) 26 A.R. 198, at p. 203); or where it would be impossible from changed conditions to restore the drain to its former usefulness and the defendant municipality had undertaken new work which would afford the desired relief. (*Fee v. Tp. of Ops*, Divl. Ct. Jan. 21, 1901.)

"To maintain the work."

Osler J.A., in delivering the judgment of the Court of Appeal in *Dillon v. Tp. of Raleigh* (1886) (13 A.R. 53, at p. 64) said, in this connection: "Where the duty arises to repair a drain already constructed a decree may be made to enforce it, the municipality being bound to procure the necessary funds in the manner pointed out by the Act, viz.:—by local assessment as in *White v. Gosfield* (10 A.R. 555)."

"Shall also be liable in pecuniary damages."

Damages will be awarded in every case where the injury complained of has resulted from the failure of the defendant municipality to perform its statutory duty of keeping the drain in repair. (*Crawford v. Tp. of Ellice* (1899) 26 A.R. 484; *Bell v. Tp. of Brooke* (1891) 14 C.L.T. 254; *Williams v. Tp. of Raleigh* (1893) A.C. 540; *Brace v. Tp. of Raleigh* (1905) 10 O.L.R. 201.) It is immaterial whether such injury has resulted from the overflowing and flooding of the lands by the waters of the drain, or from the failure of the drain to carry away water which has collected naturally upon the land if such water would have drained away if the drain had been in a proper state of repair. (*Crawford v. Tp. of Ellice* (1899), 26 A.R. 484, at p. 487). Damages are recoverable whether the injury complained of is merely temporary in its character or such as to permanently depreciate the value of the land. (*McKim v. Tp. of E. Luther* (1901) 1 O.L.R. 89, at p. 95; *Harvey v. Railroad Co.* (1906) 129 Iowa 465.) It follows therefore that a tenant is entitled to recover damages for injuries suffered by him during his tenancy, resulting from the non-repair of the drain. (*Tp. of Ellice v. Hiles* (1894) 23 S.C.R., 429, per Gwynne J., at p. 448.)

FLOODING OF A HIGHWAY.—It has been said that the flooding of a township's roads as a result of failure to repair a drain, is not an injury for which the municipality could maintain an action for damages, except insofar as it might become necessary to repair and restore such parts of them as might be washed away. Such a result is a nuisance to the public in general using the road, but is not a good cause for damages at the suit of the corporation. (*Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R., 305 at p. 314.)

NEGLIGENT OPERATION OF PUMPING MACHINERY.—It has been held by the Court of Appeal in the recent case of *Bradley v. Tp. of Raleigh* (1905) 10 O.L.R. 201 that the duty of maintaining a drainage work as imposed by sections 68 to 70 inclusive of the Act includes the proper operation of pumping machinery, where such machinery has been installed as part of a drainage scheme; and as a result, in the words of Maclellan J. A., who delivered the judgment of the Court in this case, "it follows that persons whose property is injuriously affected by the non-operation or imperfect or negligent operation of the pumping machinery are entitled to damages under the provisions of section 73."

NO DUTY TO REPAIR.—If the Act does not cast upon the defendant municipality a duty to repair the drain or that part of it, through the non-repair of which, injury has been suffered by the plaintiff, the action must fail, even where the corporation has cleared out the portion of the drain above the plaintiff's land, and as a consequence an increased flow of water has been brought down and penned back upon the plaintiff's land. *Danard v. Tp. of Chatham* (1875) 24 U.C.C.P. 590. But it would appear that a municipality may, by adopting in some unequivocal manner as part of its drainage system a drain constructed by another municipality, become liable for its maintenance, and answerable in damages for failure to perform that duty if loss has been occasioned thereby. (*Fitzgerald v. City of Ottawa* (1895, 22 A.R. 297.)

VIS MAJOR.—The plea that the injury complained of resulted from vis major as e.g. an extraordinary rainfall is a good defence only so far as the defendant municipality can establish that even if the drain had been in a proper condition the same injury would have been suffered. (*McKenzie v. Tp. of W. Flamborough* (1899) 26 A.R. 198; *Nitro-Phosphate Co. v. London & St. Katherine Docks Co.* (1878) 9 Chy. Div. 503; *Teitelbaum v. Mun. of Morris* (1907) 5 W.L.R. 449.)

The following additional cases dealing with the defence of vis major are cited under section 93 below. (*Garfield v. City of Toronto* (1895) 22 A.R. 128; *Bungenstock v. Nishnabotna Drainage District* (1901) 163 Mo. 198; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at pp. 419, 427.)

"Within fourteen days."

See *Tp. of Thurlow v. Tp. of Sidney* (1881) 29 Gr. Chy. 497 cited above under section 63; *re Sweetman & Tp. of Gosfield* (1889) 13 P.R. 293; *re Shaw & City of St. Thomas* (1899) 18 P.R. 454, cited above under section 21 (1).

"Upon four days' notice."

See *re Sweetman & Tp. of Gosfield* (1889) 13 P.R. 293, cited above under section 21 (1).

"It was the duty of the party."

Cf. section 78 of the Act.

"Shall be paid out of its general funds."

Cf. section 95 (2) of the Act, and see also *Bradley v. Tp. of Raleigh* (1905) 10 O.L.R. 201, at p. 207, cited under that section.

"Any party.....may.....appeal to the Court of Appeal."

Cf. sections 94 and 110 of the Act.

REPAIRING WITHOUT REPORT.

Deepening,
widening or
extending
without report
of engineer

74. The council of any municipality, whose duty it is to maintain any drainage work for which only lands and roads within or under the jurisdiction of such municipality are assessed, may, after the completion of the drainage work, without the report of an engineer or surveyor upon a *pro rata* assessment on the lands and roads as last assessed for the construction or repair of the drainage work, make improvements thereto by deepening, widening or extending the same to an outlet, provided the cost of such deepening, widening or extending is not above one-fifth of the cost of the construction, and does not exceed in any case \$800; and in every case where the cost of said improvements exceeds such proportion or amount, the proceedings to be taken shall be as provided in section 75 of this Act. R.S.O. 1897, c. 226, s. 74; 1 Edw. VII., c. 30, s. 2; 8 Edw. VII., c. 52, sec. 1.

"For which only lands within such municipality are assessed."

This section authorizes the improvement of such drainage works only as have been constructed at the sole cost of lands within or subject to the jurisdiction of the initiating municipality.

The duty cast upon interested municipalities, of maintaining and keeping drainage works in like state of repair as when first completed is regulated by sections 68 to 71 inclusive and by section 76 of the Act. Section 74 and 75 of the Act confer additional and broader powers upon municipalities to enlarge and extend drainage works, which may or may not be in an efficient state of repair, but which, through improper construction, insufficient depth, insufficient outlet, or other like cause, do not carry off the water they were originally intended to drain off. (*Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305, at p. 322.)

REPAIRING UPON REPORT.

Repairing
upon examina-
tion and re-
port by
engineer

75. Wherever, for the better maintenance of any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment, or to prevent damage to any lands or roads, it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work, or to cover the whole or any part of it, the council of the municipality or of

any of the municipalities whose duty it is to maintain the said drainage work, may, without the petition required by section 3 of this Act, but on the report of an engineer or surveyor appointed by them to examine and report of the same, undertake and complete the change of course, new outlet, improvement, extension, alteration or covering specified in the report, and the engineer or surveyor shall for such change of course, new outlet, improvement, extension, alteration or covering, have all the powers to assess and charge lands and roads in any way liable to assessment under this Act for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act. R.S.O. 1897, c. 226, s. 75.

(2) The provisions of this section shall apply to the better maintenance of a natural stream, creek or watercourse which has been artificially improved by local assessment or otherwise, and to any drainage work constructed under the provisions of The Ontario Drainage Act, in the same manner, to the same extent, and by the same proceedings as are hereby made applicable to the better maintenance of a drainage work wholly artificial. 6 Edw. VII., Ch. 37, sec. 9.

ORIGIN.—Although founded upon section 585 of the Municipal Act of 1892, section 75 is practically a new section. (Osler J.A. in, *re Tps. of Caradoc & Ekfrid* (1897) 24 A.R. 576, at p. 578.)

"Of any drainage work."

In, *re Stonehouse & Tp. of Plympton* (1897) (24 A.R. 416, at p. 422) it was held by the Court of Appeal that a municipality which had constructed a drainage work wholly within its own boundaries, but connected with an independent drainage work constructed by an adjoining municipality, had authority under this section to provide for necessary repairs to both drains, and to assess the adjoining municipality for its share of the cost. Osler J. A., who delivered the judgment of the Court, said, p. 422: "I concede that the drain was not one continued into any other municipality within the meaning of section (59), but nevertheless it appears to me that section 75 provides for different circumstances, and does enable the township which has constructed a drain strictly within its own boundaries to go outside of them when for the purpose of reparation or other purposes mentioned in section 75 it becomes necessary to do so, just as it might have done under similar circumstances when constructing the drain in the first instance."

The decision in *re Stonehouse & Tp. of Plympton* was subsequently approved by the same Court in *re Tp. of Raleigh & Tp. of Harwich* (1899) 26 A.R. 313, p. 317.

It has been held by the Court of Appeal, *re Tp. of Rochester & Tp. of Mersea* (1899), 26 A.R. 474, that a drainage scheme, which necessarily includes branch drains, in order to render the drainage of the area effective, may be repaired and enlarged, in a proper case, under a single joint scheme and assessment, the work being regarded as a single undertaking, and that separate reports and assessments for the repair of the main drain and for the repair of the laterals are not necessary.

"*Drainage Work*"

The phrase "drainage work" was made use of first in The Drainage Act, 1894. It replaced the word "drain" in the section of The Municipal Act 1892 (sec. 585) corresponding with section 75 of the new Act. The case of *Sutherland-Innes v. Tp. of Romney* (1900), 30 S.C.R. 495, turned upon a construction of the term "drainage work" as used in section 75. Mr. Justice Gwynne, in delivering the judgment of the Court, said (p. 524) that: "the fair and reasonable construction of this section, I think, is that the words 'drainage work' and 'work' as used in it mean precisely the same thing as the word 'drain' as used in the earlier acts." And in agreement with this opinion the Court held that section 75 applied only to the improvement of such drainage works as are wholly artificial. This judgment was in a later case (*re Tp. of Rochester & Tp. of Mersea* (1901) 2 O.L.R. 435) followed by a majority of the judges of the Court of Appeal as an authority binding upon them. Armour C.J.O., however, dissented, and pointed out (p. 436) that this construction must have been arrived at by overlooking section 3 of the Act. By the addition of subsection 2 to section 75 in 1906 the opinion expressed by Armour C.J.O. has obtained legislative sanction.

"*Constructed.*"

Judge Street in the case of *re Tp. of Anderdon & Tp. of N. Colchester* (1891) (21 O.R. 476) held that the deepening of a creek for the purpose of providing an outlet for an existing drain was not such a work as is authorized by this section. On appeal from his judgment a Divisional Court divided evenly. The same view was afterwards adopted by the Supreme Court in the case of *Sutherland-Innes v. Tp. of Romney* (1900), 30 S.C.R. 495. At p. 25 of the report of this case Gwynne J. said: "The reasonable and natural construction of this section... appears to me to be that section 75... applies only to the case of drainage works *constructed*, that is to artificial drains constructed under municipal by-laws." It was held in this case that the provisions of section 75 did not sanction the straightening and deepening of a natural stream by dredging for the purpose of affording increased drainage facilities. The decision in *Sutherland-Innes v. Tp. of Romney* was followed by the Court of Appeal, as binding upon them (Armour C.J.O. dissenting) in *Tp. of Rochester v. Tp. of Mersea* (1901) 2 O.L.R. 435. All the above decisions must now be read subject to the amendment to the Act passed by the Legislature in 1906 (6 Edw. VII., Ch. 37, sec. 9) now forming subsection 2 above. By this amendment it is enacted that "the provisions of this section shall apply to the better maintenance of a natural stream, creek, or watercourse which has been artificially improved by local assessment or otherwise." The cases above cited would therefore appear to be no longer of authority upon this point.

"Under the provisions of this Act or"

Only such drains as have been constructed under the provisions of this Act or of any other Act respecting drainage by local assessment can be altered or extended under the powers conferred by this section. The section confers no authority to alter or extend drains which have been constructed out of the general funds of a municipality. (*Tp. of Tilbury E. v. Tp. of Romney* (1895), 1 C. & S. 261.)

"It is deemed expedient."

Any municipality upon which the duty of maintaining and repairing a drain devolves under the provisions of the Act, may exercise the powers contained in this section on its own initiative, without being set in motion by any particular complainant. (*Re Tps. of Caradoc & Ekfrid* (1896) 1 C. & S. 295, at p. 298; (1897) 24 A.R. 576, at p. 579.)

"Make a new outlet."

In, *re Jenkins & Tp. of Enniskillen* (1894) (25 O.R. 399) the facts were these. A township council finding that a drain did not carry off the quantity of water it was expected to, adopted a new scheme for the construction of a drain to commence midway in the course of the existing drain and thence into an adjoining township where it was to have its outlet. It was held that the proposed drain came properly within the description of a new outlet, although not constructed at the end of the existing drain, and although the old drain was still to be used to carry off part of the water. Further that if the proposed drain was designed merely as an outlet for part of the water flowing through the old drain, its construction might be proceeded with under this section, even though it might incidentally benefit the locality through which it ran.

A scheme of reparation initiated under this section cannot be upheld, if a sufficient outlet is not provided for the water dealt with. (*Re Tps. of Raleigh & Harwich* (1899), 26 A.R. 313.)

"Improve."

Osler J. A., in delivering the judgment of the Court of Appeal in, *re Stonchouse & Tp. of Plympton* (1897) (24 A.R. 416), said, p. 421: "It seems clear, therefore, that for whatever the engineer may undertake or do under this section he may invoke all the powers which he has in regard to the original construction of a drainage work. If he had found it necessary he might have reported in favor of a new outlet or an extension of the drain into another municipality. What he had to do was to examine and report upon the Plympton drain, what repairs were needed, and how they could best be carried out. He found that it would be necessary to deepen and straighten it, and that this could not be effectually or usefully done without improving its existing outlet, the Enniskillen drain. Had he authority to report in favor of that course being adopted? I am of opinion that he had." See also *re Tps. of Raleigh & Harwich* (1899) (26 A.R. 313, at p. 317) approving of the above decision. In the case last cited, Osler J. A., speaking of a work of repair and alteration extending beyond the bounds of the moving township, said, p. 317: "When an extensive scheme is proposed to be undertaken by one township, involving work, not merely of repair but of repair and improvement, to be

done by them in an adjoining township, the onus of supporting the scheme is cast largely upon the township which propounds it. It is bound to make out that it is reasonably necessary and that it is, so far as it can be made so, complete in itself, and one which is not likely to involve the initiation of a new work by the latter township, in order to relieve itself from the waters which the other will bring down upon it."

"*Extension*"

Whether the extension of, or addition to, an existing drainage work would be such a work as might properly be undertaken under the provisions of this section, or whether it would constitute a new and integral scheme which could properly be initiated only by complying with the requirements of section 3 (1) would appear to be a question of fact to be determined upon the particular circumstances of each case as it arose. The test in each case would appear to be whether the new work will or will not primarily and materially benefit lands not assessed for the existing drain. (*Tp. of Tilbury E. v. Tp. of Romney* (1895) 1 C. & S. 261; See also *Tp. of Plympton v. Tp. of Sarnia* (1897) 2 C. & S. 223.)

"*On the report of an engineer*"

Unless a proper report is prepared by a duly qualified engineer or surveyor and adopted by the municipal council, the proceedings are irregular and open to successful attack. The cases determining what matters should be dealt with in the report, what examination of the locality to be drained should precede its preparation, and other like matters will be found collected under section 3 (1) above.

It has been held by the Court of Appeal that the report of an engineer upon the repair and improvement of a drainage work is not invalid because it does not recommend an additional scheme, which, in his opinion, would render the original drainage work more effective than a work of simple reparation, but which he has not been instructed to report upon. (*Tp. of Dover v. Tp. of Chatham* (1900) 2 C. & S. 213.)

"*Appointed by them.*"

It would seem to be sufficient if the engineer is instructed by a resolution of the council. (*Tp. of Dorchester S. v. Tp. of Malahide* (1895) 1 C. & S. 275, and additional cases cited above under sections 3 (1).)

The engineer must take the oath set out in section 5 of the Act before entering upon his duties. (*Tp. of N. Colchester v. Tp. of N. Gosfield* (1900) 27 A.R. 281.) See further upon this point the cases collected under sec. 5 above.

"*All the powers to assess and charge lands.*"

A municipality whose duty it is to maintain a drainage work may take the proceedings authorized by this section for its repair and improvement, even though the larger part of the cost is assessable against lands in an adjoining municipality. (*Re Tps. of Caradoc & Ekfrid* (1897) 24 A.R. 576.) But the municipality initiating the improvement or alteration of a drain is not justified in levying a rate upon the lands of ratepayers of an adjoining municipality, liable to contribute thereto. The municipality within which the lands are situate alone has power to do that. (*Brough-ten v. Tps. of Grey & Elma* (1895) 26 O.R. 694, at p. 707.) See also notes to section 19 (2) above.

A culvert across a street of a lower municipality was used to conduct the water brought down by a drainage work begun in an upper municipality to its ultimate outlet. It was held by the Court of Appeal that the cost of its repair and improvement was properly charged largely against the lands in the upper municipality benefited by the work. (*Tp of Camden v. Town of Dresden* (1903) 2 O.W.R. 200).

If a single assessment has been levied, part of which is for work authorized by this section, but the remainder of which is for work which could be initiated only in the manner provided for by section 3 (1) of the Act, and the provisions of that section have not been complied with, the whole assessment not being severable, is void. (*Tp. of Harwich v. Tp. of Raleigh* (1891) 1 C. & S. 55, Britton D.R.)

Two drains which had been constructed as separate works and which drained distinct areas emptied at a common outlet. It was proposed to clean out and repair each drain and to enlarge the joint outlet. All lands benefited within the two drainage areas were assessed for a share of the cost of the whole work. It was held by Hodgins D.R. that as the benefits to follow from the repair of one drain would not inure to the lands assessed for and using the other drain, that the assessment is based upon the combined cost were unjustified. (*Tp. of S. Gosfield v. Tp. of N. Gosfield* (1897) 1 C. & S. 342.)

REPAIRING WORK CONSTRUCTED OUT OF GENERAL FUNDS

76. Any drainage work heretofore or hereafter constructed out of the general funds of any municipality, or out of the general funds of two or more municipalities or when constructed by statute labour or partly by statute labour and partly by general funds or out of funds raised by a local assessment under a by-law which is afterwards found to be illegal or which does not provide for repairs, need not be repaired out of such general funds, but the council of any of the contributing municipalities may, without the petition required by section 3, on the report of an engineer or surveyor, pass a by-law for maintaining the same at the expense of the lands and roads assessable for such work, and may assess the lands and roads in any way liable to assessment under this Act, for the expense thereof in the same manner, and to the same extent, by the same proceedings and subject to the same rights of appeal as are provided with regard to any drainage work constructed under the provisions of this Act. Any such drainage work constructed out of the general funds of one or more municipalities or out of funds raised by local assessment under a by-law which is afterwards found to

Assessment
for repair of
work construc-
ted out of
general funds.

be illegal, may in like manner and under the like procedure as provided in the case of repairs under this section be deepened, widened or extended, including a new outlet for the whole or any part thereof. R.S.O. 1897, c. 226, s. 7C; 63 V., c. 38, s. 1; 4 Edw. VII., c. 10, s. 51.

In, *re Stephens & Tp. of Moore* (1894) (25 O.R. 600) Boyd C. upheld the provisions of an earlier section corresponding with section 76, and said (p. 603): "Given a beneficial drain constructed out of general funds, the council has power to keep this drain on foot or bettered by repairs, at the expense of the local territory benefited, by passing a by-law to that effect."

PAYING BACK ADVANCES.

Repayment
of advances
from general
funds on
receipt of
assessments

77. Any moneys which have been or may hereafter be advanced by the council of any municipality out of its general funds, for the purpose of any drainage work, in anticipation of the levies and collections therefor, shall be repaid into the general funds of the municipality as soon as the moneys first derived from the assessment are collected. R.S.O. 1897, c. 226, s. 77.

Duty of owners
as to cleaning
out and keep-
ing banks in
order.

77a. It shall be lawful for the council of any municipality to pass a by-law or by-laws providing that it shall be the duty of the owner of every lot or part of a lot assessed for benefit to clean out the drain and keep the same free from obstructions which may hinder or impede the free flow of the water and to remove therefrom all weeds and brushwood and to keep the banks of the drain in order to the extent and in manner or proportion and for the distance determined by the engineer in his report and in case any such owner makes default in so doing for thirty days after notice in writing from the council of the municipality the work may be done by the said council or by any officer appointed by them for the purposes of the said drain and the cost thereof after notice of the same to the person so making default and liable therefor shall be placed on the collector's roll against the lands of such owner and shall be chargeable against the said lands and be collected in the same manner as other municipal or drainage assessments. 63 V. c. 38, s. 2.

(See *Danard v. Tp. of Chatham* (1875) (24 U.C.C.P. 590) cited above under section 73 and below under section 93 (1).)

"The work may be done by the said Council."

An action will not lie against a municipality to compel it to do the work of an owner who has failed to clean out and repair the portion of the drain for the repair of which he is responsible, although it is authorized by the statute to have the work done on the owner making default. *Quick v. Parratt* (1906), 167 Ind. 31.

MINOR REPAIRS.

78. (1) When any drainage work, heretofore or hereafter constructed, becomes obstructed by dams, low bridges, fences, washing out of private drains, or other obstructions, for which the land adjoining the drainage work or the owner or person in possession thereof is responsible, so that the free flow of the water is impeded thereby, the persons owning or occupying the land shall, upon reasonable notice in writing given by the council or by an inspector appointed by the council for the inspection and care of drains, remove such obstructions in any manner caused as aforesaid, and if not so removed within the time specified in the notice, the council or the said inspector, shall forthwith cause the same to be removed.

Persons responsible for obstruction to remove same on notice.

(2) The council may by by-law appoint an inspector for the purposes mentioned in the preceding subsection, and shall in the by-law regulate the fees or other remuneration to be received by him.

Inspector of drains.

(3) If the cost of removing such obstruction is not paid by the owner or occupant of the lands liable, to the municipality forthwith after the completion of the work, the council may pay the same, and the clerk of the municipality shall place such amount upon the collector's roll against the lands liable, with ten per cent. added thereto, and the same shall be collected like other taxes, subject, however, to an appeal by the owner or occupant, in respect of the cost of the work, to the Judge of the County Court of the county in which the lands are situate. R.S.O. 1897, c. 226, s. 78.

Collection of cost of removal by municipality.

Minor repairs. 78a. The council of any municipality may by by-law direct that the inspector appointed under section 78 shall from time to time remove from any drainage work all weeds and brushwood, fallen timber or other minor obstructions for which the owner of the lands adjacent the drainage work may not be responsible and the cost of such work shall be chargeable from time to time against the lands assessed for the maintenance of the drainage work and in the proportion fixed by the by-law authorizing the drainage work, but it shall not be necessary to assess and levy the amount so charged more than once in every five years after the passing of such first mentioned by-law, unless in the meantime the total expense incurred shall exceed the sum of \$100. 7 Edw. VII., c. 42, s. 1.

"Upon reasonable notice in writing."

The owner or occupier of the adjoining land must be notified and afforded an opportunity to remove the obstruction complained of, before the municipality acquires jurisdiction to do so. *Re Clark & Tp. of Howard* (1885) 9 O.R. 576.

"If the cost is not paid."

Until a demand has been made for payment upon the party responsible, and he has refused or neglected to defray the cost, the municipality would not appear to be authorized to make payment. *Re Clark & Tp. of Howard* (1885) 9 O.R. 576.

"An inspector."

It has been held in a series of cases determined by the Courts of the State of Indiana, in considering the powers of a drainage officer empowered to order and supervise repairs, that his decision as to the necessity for, and extent of, the required repairs, when exercised in good faith, will not be reviewed by the Courts. (*Artman v. Wynhoop* (1892) 132 Ind. 17; *Romack v. Hobbs* (1895) 13 Ind. App. 138; *Zimmerman v. Savage* (1896) 145 Ind. 124, at p. 129.)

"Shall place such amount upon the collector's roll."

It has been held that the amount entered upon the roll under a similar statutory provision becomes a lien or charge upon the land of the defaulter. (*Beatty v. Purden* (1895) 13 Ind. App. 507, at p. 512; *Wicke v. Tp. of Ellice* (1906) 11 O.L.R. 422.)

"An appeal."

A municipal by-law passed under the provisions of this section, but which does not make provision for an appeal, is invalid. (*Re Clark & Tp. of Howard* (1885) 9 O.R. 576.)

CUTTING EMBANKMENTS, BANKS, ETC.

79. Any person who obstructs, fills up or injures any drainage work, or destroys, cuts or injures any embankment of any pumping works, or of any other drainage work, shall, in addition to his liability in civil damages therefor, upon the complaint of the council of the municipality or of any person affected by such obstructing, filling up, destroying, cutting or injuring, be liable upon summary conviction thereof, before a Justice of the Peace, to a fine of not less than \$5 nor more than \$100 and costs of conviction, or to imprisonment with or without hard labour for any term not exceeding six months, or in default of payment of such fine and costs or costs only to imprisonment for any term not exceeding three months. R.S.O. 1897, c. 226, s. 79.

Penalty for injury to embankments, etc.

REMOVING ARTIFICIAL OBSTRUCTIONS.

80. Wherever in the construction of any drainage work any dam or other artificial obstruction exists in the course of or below the work, and is situate wholly within the municipality doing the work, the council shall have power, with the consent of the owner thereof and of the council or councils of the other municipalities liable to assessment for the cost of the work, and upon payment of such purchase money as may be mutually agreed upon, or in default of such consent, or agreement be determined by the Referee, to remove the same wholly or in part; and any amount so paid or payable as purchase money shall be deemed part of the cost of construction and be provided for in the assessment by the engineer or surveyor. R.S.O. 1897, c. 226, s. 80. 4 Edw. VII., c. 10, s. 52.

Removal of dams, etc., on construction of work.

"Is situate wholly within the municipality doing the work."

In the drainage clauses of the Municipal Acts in force between 1886 and 1894 provision was made for the removal of artificial obstructions situate in the course of the drain within the boundaries of municipalities adjoining the initiating municipality. (55 Vic. Ch. 42 (1892) sec. 569, subsections 18, 19, 20; *Tp. of Elizabethtown v. Tp. of Augusta* (1902) 2 O.L.R. 4; 32 S.C.R. 295.) These subsections were not incorporated in The Drainage Act, 1894.

It has been held by Drainage Referee Hodgins that a municipality which has consented to the purchase of a dam as part of a drainage scheme may withdraw its consent under the provisions of section 17 of the Act, before the by-law has been passed, on indemnifying the initiating municipality against the expense incurred. (*Tp. of Augusta v. Tp. of Oxford* (1897) 1 C. & S. 345.)

OPERATING PUMPING WORKS.

Appointment
of commis-
sioners for
pumping
works, etc.

81. (1) For the better maintenance of drainage work by embanking, pumping or other mechanical operations, the council of the municipality initiating the work may pass by-laws appointing one or more commissioners from among those whose lands are assessed for construction, who shall have power to enter into all necessary and proper contracts for the purchase of fuel, erection or repairs of buildings, and purchase and repairs of machinery, and to do all other things necessary for successfully operating such drainage work, as may be set forth in the by-law appointing them; and the council may pass by-laws for defraying the annual cost of maintaining and operating the work by assessment upon the lands and roads in any way liable for assessment under the provisions of this Act. R.S.O. 1897, c. 226, s. 81.

Provided that in the case of the Island of Pelee commissioners appointed for the purposes aforesaid by the council of the township of Pelee need not be chosen from those persons whose lands are assessed for the construction of the drainage work. 8 Edw. VII. c. 52, s. 3.

Commission-
ers of pump-
ing works.

(2) Upon the petition of two-thirds of the resident owners in the drainage territory, the council of the municipality may pass by-laws empowering the commissioner or commissioners appointed under this section to use all buildings, machinery and equipments belonging to and in connection with any drainage pumping works, and to operate the same for such purposes and upon such terms as may be set forth in such by-laws upon the condition that the profits or benefits of such user shall accrue to the owners. R.S.O. 1897, c. 226, s. 81.

"One or more commissioners."

It was said by MacLennan J.A., in this connection, in delivering the judgment of the Court of Appeal in *Bradley v. Tp. of Raleigh* (1905) 10 O.L.R. 201, at p. 205: "It was argued that the appointment of these officers exonerated the township from liability for their neglect or omission, but I see no ground on which that contention can be maintained."

It is provided by the Provincial Drainage Aid Act (63 Vic. Ch. 8, section 5 (c)) that the Lieutenant-Governor in Council may assume and pay such part of the cost of the construction and maintenance of drainage works where embanking or pumping is necessary to render them effective, as may seem just and reasonable and as may be approved by the Legislative Assembly.

82. Upon the petition of two-thirds of the persons interested in any drainage work constructed by embanking, pumping or other mechanical operations and not constructed by the municipality, the council, of the municipality in which the work is situate may assume the work and maintain and operate the same, in the same manner and to the same extent as if the said drainage work had been constructed under the provisions of this Act, but at the cost of the lands and roads liable to be assessed for the work. R.S.O. 1897, c. 226, s. 82.

Assuming pumping works, etc., constructed by private persons.

DEBENTURES FOR MAINTENANCE.

83. Where the maintenance of any drainage work is so expensive that the municipal council liable therefor deems it inexpedient to levy the cost thereof in one year, the said council may pass a by-law to borrow, upon the debentures of the municipality, the amount necessary for the work, or its proportion thereof, and shall assess, and levy upon the lands and roads liable therefor a special rate sufficient for the payment of the debentures. Where such debentures are issued for the cost of repair, such as change of course, new outlet, improvement, extension, alteration or covering pursuant to the provisions of section 75 of this Act, such debentures shall be payable within twenty years from the date thereof, and where such debentures are issued for the cost of repairs pursuant to any other sections of this Act such debentures shall be payable within seven years from the date thereof. The provisions of *The Municipal Drainage Aid Act*, shall

Powers to issue debentures for cost of maintenance

Rev. Stat., c. 40.

Rev. Stat.,
C. 223.

apply to any debentures issued under the authority of any such by-law, which has before its final passing been published or of which the ratepayers have been notified in manner provided by this Act or which has, after its passing been promulgated as required by section 375 of *The Municipal Act*. R.S.O. 1897, c. 226, s. 83; 53 V. c. 38, s. 3.

"A by-law to borrow upon the debentures."

In *Alexander v. Tp. of Howard* (1887) (14 O.R. 22, at p. 39) it was held by Ferguson J. that the provisions of the section under consideration (46 Vic. Ch. 18, sec. 589) did not sanction the borrowing of money on debentures for the purpose of making repairs, unless an engineer's report had first been obtained, and the assessments made and the other prescribed formalities observed. And in the later case of *Confederation Life v. Howard* (1894), 25 O.R. 197, it was decided by the same Judge, that where the by-law under which the debenture sued upon was issued was void, the plaintiffs could not recover upon the debenture, but that they might recover the price paid as money received by the defendants to the use of the plaintiffs.

"Where such debentures are issued for the cost of change of course."

It was held by the Court of Appeal in *Sutherland-Innes v. Tp. of Romney* (1899), 26 A.R. 495 (in appeal 30 S.C.R. 495), that section 83 as it then stood did not apply where the debentures were issued to defray the cost of extending, altering or improving a drainage work as sanctioned by section 75. In 1900, this section was amended (63 Vic. Ch. 38, sec. 3) by adding the clause under consideration, by which it is provided that debentures issued for such purposes may be made payable over any period not exceeding twenty years.

"Or which has been promulgated."

See the Con. Municipal Act 1903 (3 Edw. VII. Ch. 19) secs. 375 to 377 inclusive.

REGISTRATION.—In several cases the Courts have held that the provisions of the Municipal Act requiring the registration of by-laws that authorize the issue of debentures for a longer term than one year applied to drainage by-laws of like import. (*Broughton v. Tps. of Grey & Elma* (1897) 27 S.C.R. 495, at p. 509; *Sutherland-Innes v. Tp. of Romney* (1898) 26 A.R. 495, at p. 500, and same case in appeal 30 S.C.R. 495, at p. 535). But section 398 of the Municipal Act (3 Edw. VII. Ch. 19) as it now stands expressly enacts that nothing contained in the sections of that Act providing for the registration of debenture by-laws shall make it obligatory upon a municipality to register a debenture by-law passed under the provisions of *The Municipal Drainage Act*, but that the same way be so registered at the option of the municipality.

MAKING AWARD DRAINS MUNICIPAL.

84. Upon a petition presented to the council of any municipality as provided for in section 3 of this Act, having within the area described therein any drain constructed under *The Ditches and Watercourses Act* or any other Act providing for assessment in work, signed by a majority of the owners interested in such ditch or drain, the said council may assume the same and proceed thereon in the same manner and to the same extent as for the construction of any drainage work under the provisions of this Act, and the passing of the by-law under the provisions of this Act shall in every such case be a bar to any further proceedings upon the award or under the provisions of the Act upon which such award is based. R.S.O. 1897, c. 226, s. 84.

Power to
bring drains
constructed
under Rev.
Stat., 285,
within this
Act.

"Signed by a majority of the owners interested in such ditch or drain."

In a case which came before the Court of Appeal in 1906, (*Fairbairn v. Tp. of Sandwich S.*, 8 O.W.R. 925), the work in question consisted in assuming an existing award ditch as a municipal drain under the authority of this section, and in deepening and widening it and providing it with an improved outlet. It was not disputed that a majority of the owners interested in the award ditch had petitioned, as required by this section, and the Court found that a majority of all the owners to be benefited by the additional work proposed had also petitioned. Garrow J.A. speaking for the majority of the Court, held that a majority of the latter class was necessary because of the enlargement of the drain and its extension into new territory, and that there was no objection in law to the council, on a proper petition, passing a by-law assuming an award ditch, and by the same by-law making it a part of a more extended scheme initiated under the Act.

WORK ON RAILWAY LANDS.

85. (1) The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any work on the lands of such railway company into or through which a drainage work constructed under this Act may pass, and for the payment of the cost of such work, after completion, out of the general funds of the municipality, and the amount so paid shall be assessed against the lands and roads liable for the construction or maintenance

Work on rail-
way lands.

of the drainage work, and shall be deemed part of the cost of the drainage work, and be included in the amount chargeable against lands and roads liable therefor according to the report and estimates of the engineer or surveyor.

(2) No agreement shall be entered into by a municipal council under this section without the consent in writing, filed with the clerk of the municipality, of a majority of the owners liable for the construction or maintenance of the drainage work in respect to which such work on railway lands is to be undertaken. R.S.O. 1897, c. 226, s. 85.

"May enter into an agreement."

A railway company operating under a Dominion charter is not subject to the legislative authority of a Province, and a provincial legislature cannot, therefore, authorize a municipality to construct a drain upon or across the right of way or authorized works of such railway. (*Miller v. Grand Trunk Ry.* (1880) 45 U.C.Q.B. 222; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636, at p. 638.) But power may be conferred upon a municipality in such cases to enforce the keeping in repair by the railway itself of such drains as it may construct for its own purposes. (*Canadian Pacific Ry. v. Corporation Notre Dame de Bonsecours*, 1899, A.C. 367, at p. 373.) But see now, R.S. Canada 1906, c. 37, ss. 250, 251. (The Railway Act).

An agreement entered into with a railway company was the subject of litigation in *Canadian Pacific Ry. Co. v. Tp. of Chatham* (1896) 25 S.C.R. 608. The work for the cost of which the railway brought action was the building of a culvert across the line of the railway to provide an outlet for the water brought down by the drain. The culvert was an integral and necessary part of the drainage work. It was held by the Supreme Court that the agreement was binding on the defendants notwithstanding that no provision had been made to pay the cost of building the culvert, and that the municipality might raise the amount necessary to discharge its indebtedness by amending the by-law under the authority conferred by the section which then corresponded with present section 66 of the Act. But it will be noted that this case was decided upon the law as it stood before the enactment of the present section.

Where a culvert built under a railway as part of a drainage scheme was of smaller capacity than authorized by the engineer's report, and no agreement to enlarge it had been entered into with the railway, this was considered an objection to the work. (*Ré. Tps. of Raleigh & Harwich* (1899) 26 A.R. 313, at p. 320.)

DRAINAGE WORKS CROSSING RAILWAY LANDS.—Additional powers to construct, enlarge and maintain drainage works across and upon the lands of such railway companies as are within the legislative authority of the Province of Ontario are conferred by sections 84 and 85 of The Ontario Railway Act 1906 (6 Edw. VII, Ch. 30). These sections are as follows :—

"84. (1) The company shall in constructing the railway make and maintain suitable ditches and drains along each side of, and across and under the railway, to connect with ditches, drains, drainage works and watercourses upon the lands through which the railway runs, so as to afford sufficient outlet to drain and carry off the water, and so that the then natural, artificial, or existing drainage of the said lands shall not be obstructed or impeded by the railway."

"(2) Whenever any lands are injuriously affected by reason of the drainage upon, along, across, or under the railway being insufficient to drain and carry off the water from such lands, or whenever any municipality or landowner desires to obtain means of drainage, or the right to lay water pipes or other pipes, temporarily or permanently, through, along, upon, across or under the railway or any works or lands of the Company, the Board (i.e. The Ontario Railway and Municipal Board) may, upon the application or complaint of the municipality or landowner, order the company to construct such drainage or lay such pipes, and may require the applicant to submit to the Board a plan and profile of the portion of the railway to be affected, or may direct an inspecting engineer, or such other person as it deems advisable to appoint, to inspect the locality in question and, if expedient, there hold an enquiry as to the necessity or requirements for such drainage or pipes, and to make a full report thereon to the Board; the Board may upon such report, or in its discretion, order how, where, when, by whom, and upon what terms and conditions, such drainage may be effected, or pipes laid, constructed and maintained, having due regard to all proper interests."

"85. (1) Whenever by virtue of any Act of the Province of Ontario proceedings may be had or taken by any municipality or landowner for any drainage, or drainage works, or for the construction, enlargement, improvement or extension of any ditch or watercourse upon or across the property of any landowner in the Province, proceedings may be had or taken under such Act by such municipality or landowner for the construction, enlargement, improvement or extension of the ditch or watercourse upon and across the railway and lands of the company, at the option of such municipality or landowner, in the place of the proceedings before the Board as in the next preceding section provided, and thereupon such Act shall apply to the lands of the company upon and across which such drainage or other work is required, to the same extent as to the lands of any landowner, subject, however, to any previous order or direction of the Board made or given with respect to drainage of the same lands, and provided that the company shall have the option of constructing the portion of any drain or drainage work, or ditch or watercourse, required to be constructed upon, along, under or across its railway or lands, and in the event of the company not exercising such option, and completing such work within a reasonable time, without any unnecessary delay, such work may be constructed or completed in the same manner as any other portions of such work are to be constructed under the provisions of such Act; provided always that no drainage works or ditch or watercourse shall be constructed or reconstructed upon, along, under or across the railway or lands of the company until the character of such works or the specifications or plans thereof have been first submitted to and approved of by the Board."

"(2) The proportion of the cost of the drain or drainage works or of such ditch or watercourse, across or upon the railway to be borne by the company shall in all such cases be based upon the increase of cost of such work caused by the construction and operation of the railway."

Provision for the construction of drainage works across the lands of railways under federal jurisdiction as made by R.S.C. 1906, c. 37 secs. 250, 251, the text of which will be found at p. 313 below

COST OF REFERENCE AND INCIDENTAL EXPENSES.

Certain expenses to be deemed part of the cost of the work

86. Except where otherwise provided by this Act, the cost of any reference had in connection with the construction or maintenance of any drainage work, the cost of the publication or service of by-laws, and all other expenses incidental to the construction or maintenance of the work and the passing of the by-laws, shall be deemed part of the cost of such work, and shall be included in the amount to be raised by local rate on all lands and roads liable therefor. R.S.O. 1897, c. 226, s. 86.

"All other expenses incidental"

In *Tp. of Elma v. Tp. of Ellice* (1900) 2 C. & S. 259, at p. 261, Hodgins D.R. said, in this connection: "The effect of these statutory guarantees, I think, clearly entitled the respondent municipality to be indemnified against all charges and expenses properly incurred by it, and incidental to the construction and maintenance of the drains in question."

In *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 235, Osler J.A. said: "Under this provision no doubt the cost of land necessary to be acquired for the construction of the drain would form part of the estimate."

LANDLORD AND TENANT.

Tenant's covenant to pay taxes when to include drainage assessments.

87. Any agreement on the part of any tenant to pay the rates or taxes in respect of the demised lands, shall not include the charges and assessments for any drainage work unless such agreement in express terms so provides; but in cases of contracts to purchase or of leases giving the lessee an option to purchase, the said charges and assessments for drainage work in connection with which proceedings were commenced under this Act, after the date of the contract or lease, and which have been already paid by the owner, shall be added to the price and shall be paid by the purchaser or the lessee in case he exercises his option to purchase; but the amount still unpaid on the cost of the work or repair, and charged against the lands

shall be borne by the purchaser unless otherwise provided by the conveyance or agreement. R.S.O. 1897, c. 226, s. 87.

DRAINAGE TRIALS.

88. (1) The Lieutenant-Governor in Council from time to time may appoint two Referees for the purpose of the drainage laws; that is to say, *The Ontario Drainage Act*, the provisions of this Act, and other Acts, and parts of Acts on the same subject.

Appointment of Referee

Rev. Stat. 1887, c. 36.

(2) Such Referees shall be deemed to be and shall be officers of the High Court.

To be officers of High Court.

(3) They shall be barristers of at least ten years' standing at the Bar of Ontario.

Qualification.

(4) They shall hold office by the same tenure as official referees under *The Judicature Act*.

Tenure of office. Rev. Stat. c. 51.

(5) They shall not practice as solicitors or barristers in any matter arising under this Act, nor act as legal agents or advisers in any such matter.

Not to practise in drainage matters.

(6) They shall each be paid a salary of such amount as may be appropriated by the Legislature for the purpose (not exceeding \$3,500 a year each) to be paid monthly, together with their reasonable travelling expenses.

Salary.

(7) One of the said Referees shall exercise all the rights, powers, privileges and jurisdiction conferred upon him by this Act or any other Act or Acts in the Counties of Stormont, Dundas and Glengarry, Prescott and Russell, Leeds and Grenville, Frontenac, Lennox and Addington, Prince Edward, Hastings, Northumberland and Durham, Victoria, Haliburton, Peterborough, Renfrew, Lanark, Carleton, and the other Referee shall exercise all the rights, powers, privileges and jurisdiction conferred upon him by this Act or any other Act or Acts in all the other counties and districts in the Province of Ontario.

Jurisdiction.

(8) In case of the absence or illness of either of the said Referees or in case of a vacancy in the office of either, or at the request of either, the remaining Referee may act in his place and may exercise his jurisdiction. 6 Edw. VII., ch. 37, sec. 6.

Absence or illness.

POWERS OF THE REFEREE.

Referee to have powers of an official referee under Rev. Stat. cc. 51 and 62

89. (1) The Referee shall have the powers of an official referee under *The Judicature Act* and *The Arbitration Act* and of arbitrators under any former enactments relating to drainage works, and the Referee is substituted for such arbitrators.

Powers as to compelling production, amending notices, etc

(2) In respect to all applications and proceedings before him or which may come before him under the provisions of this Act, or any former Act relating to drainage works, he shall have the powers of a Judge of the High Court of Justice, including the production of books and papers, the amendment of notice of appeal, and of notices for compensation or damages and of all other notices and proceedings; he may correct errors, or supply omissions, fix the time and place of hearing, appoint the time for his inspection, summon to his aid engineers, surveyors or other experts, and regulate and direct all matters incident to the hearing, trial and decision of the matters before him so as to do complete justice between the parties; he may also grant an injunction or a mandamus in any matter before him under this Act. R.S.O. 1897, c. 226, s. 89 (1)-(2); 1 Edw. VII., c. 30, s. 3.

Granting a mandamus or injunction.

Power to determine validity of proceedings and amend report.

(3) The Referee shall have power, subject to appeal as hereinafter provided, to determine the validity of all petitions, resolutions, reports, provisional or other by-laws, whether objections thereto have been stated as grounds of appeal to him or not, and to amend and correct any provisional by-law in question, and, with the engineer's consent and upon evidence given, to amend the report in such a manner as may be deemed just, and upon such terms as may be deemed proper for the protection of all parties interested, and, if necessary by reason of such amendments, to change the gross amount of any assessment made against any municipality, but in no case shall he assume the duties conferred by this Act upon the Court of Revision or a County Judge. R.S.O. 1897, c. 226, s. 89. (3).

"The powers of an official referee."

The meaning of this phrase came before the Courts for construction in *McLure v. Tp. of Brooke* (1902) 4 O.L.R. 97, 5 O.L.R. 50. It was held by the Court of Appeal, in this case, reversing the decision of a Divisional Court, that a drainage Referee could exercise the powers of an official referee appointed under the Judicature Act or the Arbitration Act, only in respect of such matters as he is empowered to deal with by the Municipal Drainage Act. Osler J. A., who delivered the judgment of the Court, said (p. 62): "The jurisdiction of the Drainage Referee appears to me to be limited to the administration of proceedings under the Drainage Act. The powers conferred upon him are incident to that jurisdiction. The repeal of section 94 emphasizes this. As that section stood in the Revised Statutes there was express authority to refer just such a case as this to him. If, as I think, he is not an official referee, that power no longer exists."

FORMER PRACTICE.—By section 94 of the Act as it stood prior to 1901, express power was conferred upon a Court or Judge before whom an action for damages was brought to transfer it, at any stage of the action, to the Referee, if of opinion that the proper proceeding was under the Act or that the rights of the parties might be more conveniently tried and disposed of by him. This power was taken away in 1901 by the repeal of section 94 (1 Edw. VII. Ch. 30, sec. 5).

In *re Tp. of Mersea & Tp. of Rochester* (1895) 22 A.R. 110, Hagarty C.J.O. said (p. 113): "I read many of these drainage sections as indications of the general design of the Legislature to extend the Referee's powers as far as legitimately may be done for the general arrangement of disputes between municipalities." In *Seymour v. Tp. of Maidstone* (1897) 24 A.R. 370, Osler J.A. expressed the opinion (p. 377) that the Referee as an official referee had power under this section, or under The Judicature Act, to hear a reference to him of a claim for damages made in respect of a ditch constructed under The Ditches & Watercourses Act. Both of these citations are based upon the law as it stood prior to the repeal of former section 94 and are probably broader than could be justified by the Act as it stands at present.

NO POWER TO REFER TO A REFEREE.—The question arose in a recent case (*Burke v. Tp. of Tilbury N.* (1906) 13 O.L.R. 225) whether a Judge was now authorized to refer a drainage action arising under the Act and improperly instituted by writ to a referee for adjudication. A Divisional Court held, reversing Clute J., that he was not. Mabee J., who delivered the judgment of the Court, said, with respect to the effect of the repeal of former section 94 (p. 231): "Formerly where the party had misconceived his remedy and proceeded by writ, and it was later on discovered his claim was one for compensation under the special Act, the Court transferred his claim to the referee, and the cases are numerous where that was done. Now, however, no power exists in the Court to make any order of transfer, and where proceedings are taken for the recovery of claims that fall within sec. 93 otherwise than as provided by that section, they fail." See also *Bank of Ottawa v. Tp. of Roxborough* (1908) 11 O.W.R. 320, 1106.

The earlier cases (*Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 420, at p. 453; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at p. 421; *McKim v. Tp. of E. Luther* (1900) 19 P.R. 248) affirming

the right of the Courts to remit drainage actions to a drainage referee for trial, proceeded upon the repealed section 94 and are therefore no longer of authority upon this point.

"And of arbitrators under any former enactments....."

Under the drainage clauses of the various Municipal Acts in force prior to 1891 arbitrators were entrusted with the duty of settling disputes between municipalities and individuals and between one municipality and another, attendant upon or resulting from the construction of drainage works. By the Drainage Trials Act 1891 (54 Vic. Ch. 51) the powers hitherto exercised by arbitrators were conferred upon the Drainage Referee.

"In respect to all applications and proceedings before him."

"This must be taken to mean in all matters in which jurisdiction has been conferred upon him or which he may lawfully take cognizance of—". Osler J.A. in, *Tp. of Mersea & Tp. of Rochester* (1895) 22 A.R. 110.

"The powers of a judge."

It would appear that the foregoing would authorize a referee to grant prohibition in a proper case forbidding an inferior tribunal organized under the Act as e. g. a Court of Revision taking further proceedings. See *re Tp. of Anderdon & Tp. of Colchester N.* (1891) 21 O.R. 476.

"The amendment of notice.....for compensation or damages."

In commenting upon this provision Gwynne J. said, *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 420, at p. 436: "The Referee has the fullest powers of amendment which are possessed by the High Court itself." And again: "The Referee has full power to deal with the case as he thinks fit, and to make without any application of any of the parties all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case."

A Referee has power to award compensation where damages alone are claimed. *Hiles v. Tp. of Ellice* (1892) 20 A.R. 225, per Hagarty C.J.O., at p. 230.

"Appoint the time for his inspection."

By section 97 of the Act a Referee is authorized to base his decision partly upon a personal inspection of the drainage work in question. If he inspects the work, the parties or their solicitors should have notice of his intention and an opportunity to be present. *McKim v. Tp. of E. Luther* (1901) 1 O.L.R. 89.

"He may grant an injunction."

See cases collected under this heading under section 93 below.

"A mandamus."

See cases collected under this heading under section 73 above.

"Subject to appeal as hereinafter provided."

By section 110 of the Act a right to appeal from a Referee to the Court of Appeal is conferred.

"To determine the validity of all petitions"

The cases determining what grounds are sufficient to cause a petition, report or by-law to be declared invalid are collected under section 21 (1) above.

"As grounds of appeal."

It may be questioned whether this provision would authorize the Referee to waive the requirements of section 63 that specified reasons of appeal should be definitely set out in proceedings under that section.

"With the engineer's consent and upon evidence given to amend the report."

This clause has been the subject of judicial consideration in a number of cases. In *Hiles v. Tp. of Ellice* (1894) 23 S.C.R. 429, at p. 447, it was said by Gwynne J., in delivering the judgment of the Court, that a Referee has no jurisdiction to adjudicate upon the feasibility or desirability of the route of the drain as selected by the engineer and adopted by the by-law. The remedy in such a case is by appeal against the proposed by-law. And at p. 449 of the same case it was said by the same learned Judge: "The statute which confers jurisdiction upon the learned Referee gives him no authority to reopen matters which had already been closed by the provisions of the law as it existed prior to the passing of The Drainage Trials Act." It was held by the Court, in accordance with this finding that the Referee was not authorized to vary or amend an assessment charged against the lands of the plaintiff.

It has been held, however, by the Court of Appeal, (*re Tp. of Rochester & Tp. of Mersea* (1899) 26 A.R. 474, at p. 480) that a Referee was authorized, upon taking the defined proceedings, to correct and amend an engineer's report and the assessment schedule thereto, by altering certain assessments erroneously classified as for "outlet liability" to assessments for "injuring liability," no one being damaged by the change.

In the recent case of *Tps. of Adelaide & Warwick v. Tp. of Metcalfe* (1900) 27 A.R. 92, it was decided by the Court of Appeal that a Referee cannot delegate to an engineer the power to amend conferred upon him by this section: Lister J.A., who delivered the judgment of the Court, saying (p. 94): "In the absence of express legislative authority, the Referee has no power to refer back for amendment or review a report made by an engineer in respect of a drainage work initiated under the Act. Jurisdiction is conferred upon the Referee, with the consent of the engineer, and upon evidence given, to amend a report. The Act contains no provision which authorizes the Referee to delegate this jurisdiction; it must, therefore, be exercised by the Referee, and by him only."

Not only is the power of amendment conferred upon the Referee by this section a personal power which cannot be delegated, but it is also an exclusive power, vested in him alone so long as an appeal against the report is pending before him. This is the substance of the decision of the Court of Appeal in *Tp. of Colchester v. Tp. of Gosfield N.* (1900) 27 A.R. 281, at p. 284. In this

case the Court held that while an appeal was pending before the Referee he alone had power to amend the engineer's report, under the terms set out in the section, and therefore, that the initiating municipality was not justified at such time in referring the report back to the engineer for amendment by him.

"To amend any provisional by-law."

A Referee has no power to amend a drainage by-law that has been finally passed. *Byrne v. Tp. of N. Dorchester* (1902) 2 C. & S. 318, Rankin, D.R.

Interlocutory applications, no appeal from referee thereon.

90. All interlocutory applications for any of the purposes mentioned in subsection (2) of the last preceding section shall be made to the Referee and his order thereon shall be final and conclusive. R.S.O. 1897, c. 226, s. 90.

"Interlocutory."

It was held by the Court of Appeal in *Tps. of Adelaide & Warwick v. Tp. of Metcalfe* (1900) (27 A.R. 97, at p. 95) that an order of a Referee assuming to refer back an engineer's report to him for review or amendment was not an interlocutory order within the meaning of this section, and that an appeal lay to the Court of Appeal against it.

APPEALS FROM ASSESSMENT.

Notice of appeal from assessment to be filed.

91. A copy of the notice of appeal by any municipality from the report, plans, specifications, assessments, and estimates of an engineer or surveyor or from a provisionally adopted by-law, with an affidavit of service thereof shall, within the time limited by this Act for the service of the same, be filed in the office of the Clerk of the County Court of the county or union of counties in which the drainage work commenced. R.S.O. 1897, c. 226, s. 91.

Amendment of by-law to carry out decision of referee.

92. The by-law of the initiating municipality and of any other municipalities interested shall be amended so as to incorporate and carry into effect the decision or report of the Referee or such decision or report as varied or appeal, as the case may be. R.S.O. 1897, c. 226, s. 92.

DAMAGES, COMPENSATION, ETC.

All applications, etc., affecting drainage works to be made before referee

93. (1) All applications to set aside, declare void or otherwise directly or indirectly attack the validity of any petition, report of an engineer, resolution of a council, by-law provisionally adopted or finally

passed, relating to a drainage work as hereinbefore defined, as well as all proceedings to determine claims and disputes arising between municipalities or between a company and a municipality, or between individuals and a municipality, company or individual, in the construction, improvement or maintenance of any drainage work under the provisions of this Act, or consequent thereon, or by reason of negligence, or for a mandamus or an injunction, shall hereafter be made to and shall be heard or tried by the referee only, who shall hear and determine the same and give his decision and his reasons therefor, but where the amount awarded upon a claim for damages in connection with a drainage work does not exceed \$60, the costs allowed to the plaintiff shall be on the Division Court scale, so far as the same is applicable. 1 Edw. VII., c. 30, s. 4 (1); 3 Edw. VII., c. 22, s. 5.

(2) Proceedings for the determination of claims Procedure. and disputes and for the recovery of damages by reason of negligence, or by way of compensation or otherwise, or for a mandamus or injunction, under this section, shall hereafter be instituted by serving a notice claiming damages or compensation, or a mandamus or an injunction, as the case may be, upon the other party or parties concerned, and the notice shall set forth the grounds of the claim.

(3) A copy of the notice with an affidavit of service thereof shall be fyled with the clerk of the county court of the county or union of counties in which the lands in question are situate, and the notice shall be fyled and served within two years from the time the cause of complaint arose. Service of notice of claim.

(4) All applications under this section shall be made by notice of motion based upon affidavits fyled, not less than ten days before the date on which the motion shall be made, with the clerk of the county court of the county or counties in which the municipality whose proceeding is called in question is situate. Notice of motion.

(5) No application or proceeding within the meaning of this section shall be made or instituted otherwise than as therein provided. 1 Edw. VII., c. 30, s. 4, (2)-(5). Proceedings to be taken under this section.

"All applications.....as well as all proceedings shall hereafter be made to.....the Referee.

The jurisdiction of the drainage referee to hear and determine all such matters of controversy as are enumerated in this section is now an exclusive jurisdiction. Prior to 1901, the Court was authorized by former section 94 (R.S.O. 1897, Ch. 226, sec. 94) to refer actions for damages which should have been commenced by notice as provided by this section, to the drainage referee for trial. By the repeal of this section, in that year (1 Edw. VII. Ch. 30, sec. 5) that power was taken away, and to further emphasize the intention of the Legislature subsection 5 was added to section 93. As the Act stands at present, if any proceeding is taken or suit entered in any of the Courts of the Province and the matter at issue in such proceeding or suit falls within the jurisdiction conferred upon the referee it fails and must be dismissed. (*Burke v. Tp. of N. Tilbury* (1906) 13 O.L.R. 225, at p. 231. *Bank of Ottawa v. Tp. of Roxborough* (1908) 11 O.W.R. 320, 1106).

"To set aside."

The proceedings to be taken by anyone who desires to have a drainage by-law set aside or quashed are set out in section 21 (1) of the Act.

"To declare void."

Where there has been a clear departure from the terms of the Act in an essential particular the Courts will treat the by-law based upon such irregular proceedings as invalid, although it may not have been quashed within the prescribed period. (*Sutherland v. Tp. of E. Nisouri* (1853) 10 U.C.Q.B. 626, at p. 628; *Alexander v. Tp. of Howard* (1887) 14 O.R. 22, at p. 43; *re Tp. of Anderdon & Tp. of Colchester N.* (1891) 21 O.R. 476, at p. 480.)

"Directly or indirectly."

A frequent case of indirect or collateral attack is where the initiating municipality institutes proceedings to recover the amount assessed against another municipality or landowner for its or his share of the cost of a drainage work, and the defendant relies on defects or irregularities in the by-law or report as valid grounds for resisting payment. (*Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, at p. 526, cited above under section 63; see also *Thompson v. Mitchell* (1907) 133 Iowa 527.)

"The validity of any petition."

The cases determining what defects are fatal to the validity of a drainage petition are collected under section 21 (1) above.

"Report of an engineer."

Such defects in an engineer's report, or in the manner of its preparation, as have been held sufficient to render it invalid are enumerated, and the supporting cases cited, under section 21 (1) above.

"By-law."

See cases collected under section 21 (1) above.

"As well as all proceedings to determine claims and disputes."

This does not include the settlement of disputes between assessed owners and the initiating municipality and between different assessed landowners in the same municipality as to the propriety or quantum of their assessments. Jurisdiction over such matters is committed by the Act to the Courts of Revision to be constituted and held as defined by the Act, and on appeal therefrom to the County Judge. With such disputes the referee has nothing to do. (See sec. 89 (3) above.)

"Claims and disputes arising."

"The new section 93 is expressly made applicable to all claims in or consequent upon construction, as well as to claims for maintenance or want of repair and indeed to all sorts of damage claims." Per MacLennan J. A. in *Wigle v. Tps. of N. & S. Gosfield* (1904) 7 O.L.R. 302, at p. 314.

"Between individuals and a municipality."

A party affected injuriously by the construction of a drain may commence proceedings in his own name, and is not obliged to enter his claim in the name of the Attorney-General. (*Smith v. Tp. of Raleigh* (1882) 3 O.R. 405.)

If a ratepayer is estopped by his conduct from entering suit on his own behalf, he cannot proceed in a representative capacity, on behalf of others who might be entitled to complain. (*Dillon v. Tp. of Raleigh* (1886) 13 A.R. 53, at p. 67; aff. 14 S.C.R. 739.)

CONSOLIDATION OF SEPARATE ACTIONS AGAINST THE SAME MUNICIPALITY.—In *Williams v. Tp. of Raleigh* (1890) 14 P.R. 50, it was held by Ferguson J. that actions brought by different plaintiffs against the same municipality for damages alleged to have arisen from the negligent construction of a drainage work could not properly be consolidated, since it was necessary for each plaintiff to prove that the negligence complained of had caused the injury to his particular parcel of land, and a separate assessment of damages would have to be made in each case.

"In the construction of any drainage work."

TRESPASS.—If a municipality has undertaken the construction of a drainage work, without having first taken the proceedings prescribed by the Act as necessary to vest authority in it, or without having first passed a proper by-law authorizing the doing of the work, or if it usurp powers not given it by the Act, and if in any such case, during the progress of the work it enters upon private lands, or during such time or subsequently causes any damage to any landowner, it is liable in damages for trespass. (*Woodruff v. Fisher* (1853) 17 Barb. N.Y. 224, at p. 235; *Hildreth v. City of Lowell* (1858) 11 Gray (Mass.) 345; *Van Egmond v. Town of Seaforth* (1883) 6 O.R. 599, at p. 610; *McArthur v. Town of Collingwood* (1885) 9 O.R. 368; *Pratt v. City of Stratford* (1888) 16 A.R. 5, at p. 16; *Lawrence v. Town of Owen Sound* (1903) 5 O.L.R. 369; *Lewis v. City of London* (1896) MacMahon J. reported Coutlee's Dig. Unreported Cases p. 162.)

Such an action or proceeding is based not upon the doing of a rightful act negligently, but upon the doing of a wrongful act not authorized by law. (Street J. delivering the judgment of a Divisional Court in *Lawrence v. Town of Owen Sound* (1903) 5

O.L.R. 369.) If, therefore, the act which the municipality is about to commit is one that may produce serious injury, it may be enjoined as any other trespasser. (*Woodruff v. Fisher* (1853) 17 Barb. N.Y. 224, at p. 235.) But if a by-law has been passed which is prima facie within the authority of the initiating municipality, no proceeding can be commenced or damages awarded for anything done under it, which the by-law would have justified if it had been valid, until such by-law is first set aside. (Con. Mun. Act 1903, sec. 468.) An action for trespass, therefore, will not lie under such circumstances. (*Hill v. Middagh* (1889) 16 A.R. 356, per Hagarty C.J.O., at p. 374; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, per Osler J.A., at p. 427.)

It has been held by the Supreme Court (*Town of Truro v. Archibald* (1901) 31 S.C.R. 380) that a landowner's right of action against a municipality for trespass is constructing and maintaining a drain through his land without legal authority is a continuing right that is not liable to be prescribed.

It would appear to result from the recent decision of a Divisional Court in *Burke v. Tp. of N. Tilbury* (1906) 13 O.L.R. 225, that all claims for damages for trespass, in cases where the defendant municipality has proceeded under a valid by-law, but has exceeded the powers thereby conferred upon it, must now be entered for hearing before a drainage referee, in the manner provided for by this section.

COMPENSATION—Prior to the separation of the drainage clauses from the Municipal Act and their collation into their present form, the Courts were frequently called upon to determine whether the substance of the claim made by a landowner who had entered an action against a municipality arising out of the construction of a drainage work, was not in fact a claim for compensation, in which case it was held that he had misconceived his remedy and that he should have proceeded under the arbitration clauses of that Act. (*Hodgins v. Counties of Huron & Bruce* (1866) 3 Err. & App. 169, at p. 193; *Preston v. Tp. of Camden* (1887) 14 A.R. 85, at pp. 87, 90; *Pratt v. City of Stratford* (1888) 16 A.R. 5.) By uniting in a single official, the Drainage Referee, the jurisdiction formerly exercised in part by arbitrators appointed under the Municipal Act and in part by the regular Courts, and by referring to him for adjudication all manner of claims arising out of the construction of a drainage work the possibility of a party seeking redress mistaking the proper forum has been largely done away with. But if a claim coming within the jurisdiction conferred by the Act upon the referee is prosecuted by action in the regular way, the action must be dismissed. (*Burke v. Tp. of N. Tilbury* (1906) 13 O.L.R. 225.)

WHEN COMPENSATION IS TO BE AWARDED.—Proper pecuniary compensation is to be awarded any landowner whose land has been taken or injuriously affected by a municipality, during, or as a result of, the construction of a drainage work. (*Re Hodgson & Tp. of Bosconquet* (1886) 11 O.R. 589; *re Byrne & Tp. of Rochester* (1889) 17 O.R. 354; *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 235; *re Cheesebrough* (1879) 78 N.Y. 232, at p. 236; *Union District Drainage Commrs. v. Volke* (1896) 163 Ill. 243; *Chronic v. Pugh* (1891) 136 Ill. 539; *Rhodes v. Tp. of Raleigh* (1898) 2 C. & S. 141, at p. 144; *re Farrand & Tps. of Morris & Grey* (1905) 6 O.W.R. 686; *Preston v. Tp. of Camden* (1887) 14 A.R. 85; *Pinkstaff v. Allison Ditch District* (1904) 213 Ill. 186. *Essex v.*

Acton Local Board, (1889), L. R. 14 A. C. 153. See also 3 Edw. VII. (Ont.) Ch. 19, sec. 437).

In *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 235. Osler J. A. said, in this connection: "It is observable that there is no express reference in section (93) or elsewhere to the cost of the land through which the drain is actually made, and which is expropriated for the construction of the drain itself. It is needless to say that in the great majority of cases, the land would be worthless to the owner for any purpose except that of constructing the drain for the improvement of the rest of the property. And it is on that, in general, well founded assumption that the engineer's estimate of the cost of construction may be safely based. Nevertheless where land which has an independent value is taken for the purpose of the drain, or is injuriously affected by reason of the construction of the drain, the owner's right to compensation is clear, and it ought to be ascertained in the manner provided by the Act. The engineer is not the person to settle it, though he may place in his estimate, as he has done here, a sum which he thinks sufficient. If accepted the claim would thus be settled by mutual agreement. The engineer's duty is to assess against each lot that proportion of the cost of the work, which he thinks it ought to bear for the benefit it will derive from the work. I do not think that any power has been conferred upon him to set off benefit against damage. The same observation applies to the Court of Revision; they are not, any more than is the engineer, the tribunal constituted by the Act to assess the owner's right to, and the amount of, his compensation."

EXTENT OF OWNERSHIP ACQUIRED BY MUNICIPALITY.—In cases where lands have been taken for the purposes of drainage works, the courts have differed in opinion as to the extent of ownership necessarily acquired by the municipality. In *Chronic v. Pugh* (1891) 136 Ill. 539, at p. 547, the Court described the extent and effect of an appropriation of private lands for drainage purposes as follows: "The construction and maintenance of a drain of this character impose upon the land over which it is constructed a perpetual servitude, and it needs no argument to show that besides the interference with the soil inseparable from the construction of the drain, the creation of such servitude necessarily involves various other elements which are equally deserving of compensation. The interest or easement thus acquired imposes upon the servient estate not merely the burden of having the soil perpetually used as a conduit for carrying off the drainage from the dominant estate, but the owner of that estate his heirs and assigns, acquire in perpetuity, the right to enter, at all proper seasons for the purpose of making repairs, and the servient lands are subjected for all time to the burden of receiving the water which will continually be discharged upon it from the drain." In *Rhodes v. Tp. of Raleigh* (1898) 2 C. & S. 141, at p. 144, Drainage Referee Hodgins said, in this connection: "Though the owner's estate and ownership in the soil of the lands used as the channel of the drain are not *nomine* expropriated or vested in the municipality" . . . yet the municipality on behalf of the owners of land benefited by the drain acquires a right of entry upon, and user of, and easement over such lands "substantially equal to a taking or expropriation of the lands for the purposes of the drain, and their value should therefore be estimated and dealt with on the same basic principle of full compensation as for lands taken and expropriated for public purposes under the Municipal Act."

The opinion that a municipality is authorized to acquire an easement in, or right to use and enter upon, the lands through which a drain is constructed, and to have compensation assessed upon that basis, and is not obliged to acquire and pay for the fee simple of the lands forming the bed of a drain is vigorously supported by MacLennan J. A. in his judgment in *re Prittie & City of Toronto* (1892) 19 A.R. 503, at p. 518, in which view Hagarty C.J.O. seems to concur (p. 507). Osler J.A., however, (p. 531) held to the contrary view. That the municipality takes the fee and not an easement in the land expropriated, and that compensation must be allowed on this basis is supported by the following additional authorities. (*Re Water Commrs. of Amsterdam* (1884) 96 N.Y. (Sickels) 351; *Page v. O'Toole* (1887) 144 Mass. 303; *re Davis & City of Toronto* (1891) 21 O.R. 243.)

In delivering the judgment of the Court in *re Cheesebrough* (1879) 78 N.Y. (Sickels) 232, Earl J., at p. 236, put the matter thus: "His lands so far as they were used for these drains were permanently appropriated for the use thereof." In *re Water Commrs. of Amsterdam* (1884) 96 N.Y. (Sickels) 351, a case arising out of the condemnation of certain lands for the purpose of storing water upon them, Danforth J. in delivering the opinion of the Court, said, p. 358: "The right to enter upon and use land for that purpose is necessarily exclusive, and is assumed by the respondents to be perpetual. It cannot co-exist, therefore, with a private right capable of concurrent exercise. The occupation of the public is not intended to be temporary, but permanent. No private person can do upon the land any act of ownership."

FULL VALUE OF LAND TAKEN OR INJURED TO BE ALLOWED FOR.—Various rules have been formulated by the Courts for ascertaining the amount that shall be allowed in any given case by way of compensation for lands taken or injuriously affected by the construction of drainage or other public works. It is generally agreed that the landowner should be awarded full compensation both for the land taken and for the injury, if any, sustained by him as to the land which is not taken, necessarily resulting from the appropriation of his land and the construction of the drain. (*Re Richardson & City of Toronto* (1889) 17 O.R. 491, at p. 492; *Chronic v. Pugh* (1891) 136 Ill. 539; *Union District Drainage Commrs. v. Volke* (1896) 163 Ill. 243. *Essex v. Acton Local Board* (1889) L.R. 14 A.C. 153).

In *Chronic v. Pugh* (1891) 136 Ill. 539, at p. 549, the Court said: "We think that substantially the same rules for the ascertainment of damages which prevail in proceedings for the condemnation of private property for public use should be adopted in cases arising under this statute." It has been held that the measure of the damage sustained for which compensation should be allowed is the amount by which the fair cash market value of the land before the taking or construction exceeds its value afterwards so far as it has diminished in value from the taking or the injury complained of. (*McPherson & City of Toronto* (1895) 26 O.R. 558, at p. 566; *Sanitary District of Chicago v. Herbert* (1903) 108 Ill. App. 532.) In *Rhodes v. Tp. of Raleigh* (1898) 2 C. & S. 141, Referee Hodgins allowed the actual cash value of the land per acre without buildings for the quantity of land occupied by the channel of the drain.

The statute has been held to sanction the awarding of compensation in respect of the following matters. The cost of constructing necessary farm bridges over the drain. (*Re Hodgson &*

Tp. of Bosanquet (1886) 11 O.R. 589; *re Byrne & Tp. of Rochester* (1889) 17 O.R. 354; *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226; *Pinkstaff v. Allison Ditch District* (1904) 213 Ill. 186.) For piling the excavated earth in embankments on the land on each side of the drain, and also for injury caused through the spreading of poor or unfertile soil over adjoining lands. (*Re Hodgson & Tp. of Bosanquet* (1886) 11 O.R. 589; *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226; *Rhodes v. Tp. of Raleigh* (1898) 2 C. & S. 141; *Pinkstaff v. Allison Ditch District* (1904) 213 Ill. 186.) For cutting off access between different portions of a farm, or between a farm and the highway. (*Pinkstaff v. Allison Ditch District* (1904) 213 Ill. 186; *re Leak & City of Toronto* (1899) 29 O.R. 685; 26 A.R. 351.) For the cost of putting in and maintaining flood-gates. (*Re Byrne & Tp. of Rochester* (1889) 17 O.R. 354.) For being prevented by the construction of the drain from using a certain water privilege on a stream which ran through the farm, and for the loss of the claimant's right or easement of penning back its waters and flooding adjacent land. (*Re Farrand & Tps. of Morris & Grey* (1905) 6 O.W.R. 686.) But where the drain formed the boundary between two neighbouring properties and there was no prescriptive or statutory obligation to fence Referee Hodgins disallowed the cost of fencing and of constructing bridges. (*Rhodes v. Tp. of Raleigh* (1898) 2 C. & S. 141.) And it has been held by Referee Britton that a landowner could not claim for permanent injury sustained by the land prior to the commencement of his ownership. (*Buchanan v. Tp. of Ellice* (1895) 1 C. & S. 254.) In *Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305, at p. 313, it was decided by the Supreme Court that the flooding of a township road as the result of the construction of a drainage work was not an injury for which the municipality could support an action for compensation. Gwynne J., in delivering the judgment of the majority of the Court said, p. 313: "Their roads might thereby become impassable for a longer or shorter period, but that would constitute an injury in the nature of a nuisance to Her Majesty's subjects generally requiring to use the roads, but would give no cause of action to the corporation to recover pecuniary damages by way of compensation for such nuisance or otherwise. The only pecuniary compensation which the corporation in an action of this nature could, as it appears to me, claim would be for the cost of repairing and restoring any of their roads which might be washed away by floods occasioned by the wrongful or negligent conduct of the defendants." See also on this point *Tp. of Merritt v. Harp* (1905) 141 Mich. 233.

RIGHT OF MUNICIPALITY TO SET OFF BENEFIT AGAINST COMPENSATION.—The question has arisen in a number of decided cases whether a municipality is entitled to set off against the amount claimed by a landowner as compensation for land taken or injuriously affected by the construction of a public work the increased value which will accrue to the lands in question as a result of the doing of the work. In *re Richardson & City of Toronto* (1889) 17 O.R. 491, at p. 492, Street J. said: "The landowner is entitled to full compensation for the land taken and for the injury sustained. That compensation must be given entirely in money where the injury is the only element, and no benefit results from the work for which the property is taken. But in cases where there is benefit to the property not taken, as a result of the work for which a part is taken, then the landowner must make allowance for the benefit he receives in his claim for the injury which he sustains. The

principle is, that where private property is taken for the public good, the private owner must not suffer, but must be fully compensated for that which is taken from him, but is not to make a profit out of the necessity which compels the public to take his property." The Court of Appeal rendered a similar decision in 1892, in *re Pryce & City of Toronto* 10 A.R. 16. The view has been taken, however, in some cases, that a landowner cannot be required under such circumstances to accept credit against the amount assessed against his property for benefit instead of a cash payment. (*Elgin & Ct. Ry. Co. v. Hohenachell* (1901) 193 Ill. 159; and see *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 236.) But if the landowner consents to a set-off of the amount allowed him for compensation against his assessment for benefit he cannot afterwards complain. (*Ginn v. Moultrie* (1900) 188 Ill. 305.)

TIME WHEN RIGHT TO COMPENSATION ACCRUES.—In *re Prittie & City of Toronto* (1892) 19 A.R. 503, it was held by the Court of Appeal that the date of the by-law authorizing the work was properly taken as the time at which the right to compensation for land taken accrued. On the other hand it has been held that the date upon which the land was actually entered upon and taken fixes the time at which the value of the land expropriated is to be determined. (*Saunders v. City of Lowell* (1881) 131 Mass. 387, at p. 388.) A claim made in respect to lands injuriously affected has been said to be a claim for unliquidated damages, and, therefore, that no debt arises in such a case until amount of the claim has been ascertained and assessed by the proper authority. (*Re Leak & City of Toronto* (1899) 26 A.R. 351, at p. 357.)

If the taking of the land or such other act as is complained of has been authorized by by-law, and is such as necessarily results from the exercise of the powers conferred upon the municipality, and is done without negligence, the claim is for compensation. (*Hodgins v. Counties of Huron & Bruce* (1866) 3 Err. & App. 169, at p. 193; *Stonehouse v. Tp. of Enniskillen* (1872) 32 U.C.Q.B. 562; *McGarvey v. Town of Strathroy* (1885) 10 A.R. 631, at p. 638; *Preston v. Tp. of Camden* (1887) 14 A.R. 85, at pp. 87, 90; *Pratt v. City of Stratford* (1888) 16 A.R. 5.)

COMPENSATION TO LOW LANDS FOR FLOODING.—By section 8a of the Act, as enacted in 1902 (2 Edw. VII. Ch. 32, sec. 1) power is conferred upon the engineer, in all cases where the cost of conducting the water collected by a drain beyond a certain point to a sufficient outlet would be greater than the amount by which low lying lands in the vicinity of the proposed outlet would be depreciated in value by having such water deposited upon them, to award the owners of such lands compensation for such contemplated injury, and to terminate the drain at such point.

DAMAGE CLAIMS FOR INJURIES NECESSARILY RESULTING FROM THE CONSTRUCTION OR OPERATION OF DRAINAGE WORKS.—The general rule as to the liability of a municipality which has constructed a drainage work under the authority of and in the manner prescribed by statute to persons who suffer injury thereby is that, apart from any special statutory provision awarding compensation, and in the absence of negligence, no redress can be had for such injuries as necessarily result from the doing of the work. In the leading case of *Geddis v. Bann Reservoir* (1878) (L.R. 3 App. Cas. 430) this principle is laid down by Lord Blackburn (p. 455) as follows: "For I take it, without citing cases, that it

is thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is within this rule 'negligence' not to make such reasonable use of their powers." In a case which came before the Supreme Court of Massachusetts in 1875 (*Washburn Mfg. Co. v. City of Worcester* 116 Mass. 458, at p. 460.) Gray C. J. said: "Where a city or board of municipal officers is authorized by the Legislature to lay out and construct common sewers and drains, and provision is made by statute for the assessment, under special proceedings, of damages to parties whose estates are thereby injured, the city is not liable to an action at law or bill in equity for injuries which are the necessary result of the exercise of the powers conferred by the Legislature. But if by an excess of the powers granted, or negligence in the mode of carrying out the system legally adopted, or in omitting to take due precautions to guard against consequences in its operation, a nuisance is created, the city is liable to indictment on behalf of the public, or to a suit by individuals suffering special damage."

The rule pronounced in the cases cited above has been adopted and followed generally by the various Courts, whenever like cases have come up for determination. (*Northwood v. Tp. of Raleigh* (1882) 3 O.R. 347, at p. 359; *Atcheson v. Municipality of Portage La Prairie* (1893) 9 Man. L. R. 192; *Hornby v. New Westminster Southern Ry.* (1899) 6 B.C.R. 588; *Fee v. Tp. of Ops* (Divl. Court Jan. 21, 1901).)

In agreement with the above decisions, it was held in *Murphy v. City of Lowell* (1880) (128 Mass. 396) that a city which had a legal right to construct sewers under its streets, and which was proceeding thereunder in a lawful manner, was not liable for damage resulting from the necessary blasting of rocks during such construction, but only for such damages as were occasioned by the carelessness or unskilfulness of its agents in doing the work,

ANSWERABLE FOR DAMAGES IF THERE IS NO BY-LAW.—But a municipality which has constructed a drainage work, without having first passed a proper by-law, or under a by-law which affords it no protection because it does not conform to or is not based upon essential statutory prerequisites necessary to give jurisdiction, is not within the protection of the rule laid down in *Geddis v. Bann Reservoir*, and is answerable in damages for all injuries sustained by reason of the construction or operation of the drain, without regard to whether it was properly or negligently made or operated. (*Misener v. Tp. of Wainfleet* (1882) 46 U.C.Q.B. 457; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417; *Duggan v. Tp. of Ennis-killen* (1898) 2 C. & S. 81; *Priest v. Tp. of Flos* (1901) 1 O.L.R. 78, at p. 83; *Lawrence v. Town of Owen Sound* (1903) 5 O.L.R. 369; *Taylor v. Tp. of Collingwood* (1905) 10 O.L.R. 182.) The same result follows if the municipality has in the construction of the drain exceeded the powers conferred upon it by the by-law, as for example where it has constructed an additional stretch of drain not authorized by the by-law and damage results therefrom (*Washburn Mfg. Co. v. City of Worcester* (1875) 116 Mass. 458, at p. 460; *Bell v. Tp. of Brooke* (1891) 14 C.L.T. 254; or where the

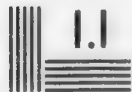


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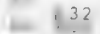
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municipality in cleaning out a drain has increased its depth and capacity, without having first taken the appropriate proceedings to authorize such work and has thereby caused increased quantities of water to be cast upon the plaintiff's land. (*Tp. of Merritt v. Harp*, (1905) 141 Mich. 233.)

"Or consequent thereon."

Injuries suffered after the completion of a drainage work, by overflow and by the deposit of sand and debris upon the land of the complainant, have all been held to be damages consequent upon the construction of the drain, within the meaning of this clause. (*Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 447; *Wigle v. Tps. of Gosfield N. & S.* (1904) 7 O.L.R. 302, at pp. 305 & 306.) Relief for such damages must therefore be sought by application to a Referee in the manner laid down by the Act. (*Sutherland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495, at p. 516.)

"By reason of negligence."

If a municipality has constructed or operates, or permits the operation or user of, a drainage work in a negligent manner, or in, what is tantamount in law, a way which has caused any injury to others that might have been avoided by a more careful or reasonable exercise of its powers, it is answerable in damages for such injuries as are sustained as a consequence.

The general rule that a municipality is answerable in damages for all injuries sustained as a result of the negligent or improper construction or operation of a drainage work is clearly established. (*Reeves v. City of Toronto* (1861) 21 U.C.Q.B. 157; *Washburn Mfg. Co. v. City of Worcester* (1875) 116 Mass. 458, at p. 460; *Coghlan v. City of Ottawa* (1876) 1 A.R. 54; *Stonehouse v. Tp. of Ennis-killen* (1872) 32 U.C.Q.B. 562; *Law v. Town of Niagara Falls* (1884) 6 O.R. 467, at p. 469; *Welsh v. City of St. Catharines* (1886) 13 O.R. 369, at pp. 379, 380; *Derinzy v. City of Ottawa* (1887) 15 A.R. 712; *Bungenstock v. Nishnabotna Drainage District* (1901) 163 Mo. 198; *Bradley v. Tp. of Raleigh* (1905) 10 O.L.R. 201, at p. 204; *Valad v. Tp. of Colchester S.* (1895) 24 S.C.R. 622.)

FAILURE TO EXERCISE REASONABLE CARE.—If, by a reasonable exercise of the powers to construct and operate drainage works conferred upon a municipality by the Act, it might have avoided the cause of the injury complained of, it is negligence within the rule not to have made such reasonable use of their powers. (*Geddes v. Bann Reservoir* (1878) L.R. 3 App. Cas. 430, at p. 455.) Thus in *Brown v. Sarnia* (1853) 11 U.C.Q.B. 87, where the question whether a municipality could in constructing a highway cause water to flow upon the land of an adjoining ratepayer came up for consideration, Robinson C.J., in delivering the judgment of the Court, said (p. 89): "If by their drain they throw water upon the plaintiff's land which would otherwise never have got there, they occasion him an injury which they must show he is bound to submit to in consequence of some statutory provisions; and they must go further, and show that the circumstances were such as to compel them to take that course for relieving the road from water, and that they have done no injury to the plaintiff which, by proper management and care, they could have avoided." And in a similar case of damages resulting from the construction of a highway drain, (*Rowe v. Tp. of Rochester* (1870) 29 U.C.Q.B. 590) Wilson J. said (p. 595): "The defendants no doubt were entitled

to and bound to make and maintain the highway fit for the public travel, and for that purpose to drain it, if drainage were required. In the execution of such work they must, however, so use their own property as not to injure that of their neighbour. I cannot conceive what right they have to drain all the surface waters of the township, or of any particular area, up against the land of another, and to drown it in part or altogether, to the destruction of his farm, although they may have done their work in the most skilful and scientific manner, and although it may have been necessary to drain in this manner for the making of a good road." The rule adopted in these cases applies with even greater force where injury has been occasioned by drainage works constructed under the provisions of the Municipal Drainage Act, as the undertaking of such works is not a matter of such general public necessity as is the construction of highways, and the municipality is not obliged to proceed with the work. In *Northwood v. Tp. of Raleigh* (1882) 3 O.R. 347, at p. 359, Boyd C. said: "If the Act gives power to this corporation to convey by means of these channels to a natural outlet a body of water which would not otherwise in the same manner pass down these channels, and to do all things necessary and proper therefor, that power does not enable or authorize them to flood the lands of the neighbouring proprietor unless it would be impossible to avoid or prevent such flooding by any reasonable and proper use of their statutory powers."

AN INSUFFICIENT OUTLET CONSTITUTES NEGLIGENCE.—It has been repeatedly held that a drain, which has been constructed without provision being made for a sufficient outlet for the water collected by it, has been constructed in a negligent or illegal manner, and that the initiating municipality is, therefore, liable in damages for such injury as is occasioned thereby. (*Northwood v. Tp. of Raleigh* (1882) 3 O.R. 347, at p. 358; *Stalker v. Tp. of Dunwich* (1888) 15 O.R. 342; *Malott v. Tp. of Mersea* (1885) 9 O.R. 611; *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 446; *Law v. Town of Niagara Falls* (1884) 6 O.R. 467, at p. 469; *Young v. Tucker* (1899) 26 A.R. 162, at p. 169, 30 S.C.R. 185; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636; *Foster v. Municipality of Lansdowne* (1899) 12 Man. L. R. 416; *Chatwin v. Rosedale* (1907) Man. 6 W.L. R. 474. *Redfern v. Hancock County Commrs.* (1898) 18 Ohio C.C. 233; *French v. White* (1855) 24 Conn. 170.)

In the case of *Northwood v. Tp. of Raleigh* (1882) (3 O.R. 347, at p. 358) Boyd C. said, in this connection: "If an individual collects surface water dispersed over his land, which would naturally disappear by absorption or evaporation, and by means of a trench carries it off in a stream so as to appreciably injure his neighbours he commits an unlawful act. . . . And similarly, if any body of individuals or corporation so act—that is collect and discharge upon the land of a private owner, a body of water which would have otherwise not found its way there—they offend against the law. I find nothing in our municipal or other legislation to change the illegal character of such an act. If a municipality undertakes the responsibility of constructing a system of drainage works, by which the surface water distributed over a large territory is gathered into one channel and then discharges that volume of water upon the lands of a farmer, without providing any proper outlet, it would be strange indeed if the spoliation of property resulting therefrom should not be made good by the body so offending." In a more

recent case, where it appeared that the initiating municipality had not made provision for a proper outlet for the water collected by the drain (*Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 446) Gwynne J. said: "In such case the liability would, in my opinion, arise as from an act done without any jurisdiction whatever and utterly ultra vires and not merely as for negligence in the mode of performing an act legal in itself."

The above cases should now be read in conjunction with the provisions of section 9(10) of the Act by which a limited power is conferred upon municipalities to flood low lying lands upon first compensating the owners of such lands, instead of continuing the drain to a sufficient outlet.

In *Bungenstock v. Nishnabotna Drainage District* (1901) 163 Mo. 198, it was established that by the unskilful construction of a ditch, projected through the plaintiff's land, for the purpose of straightening a river as part of a drainage work, his land was damaged by the collection of stagnant water in the old channel, which contaminated his well, flooded his cellar and caused the atmosphere to become unwholesome. It was held that the plaintiff was entitled to damages in respect to these matters, and that the amount to be awarded him should be the difference between the value of his farm before the ditch was dug and its value after it was dug, so far as the depreciation was the result of the acts complained of.

CIRCUMSTANCES UNDER WHICH THE MUNICIPALITY IS NOT RESPONSIBLE.—But in the absence of proof of negligence in construction, a municipality is not liable in damages on the ground that the drain might have been dug on a more direct and less expensive course, which would not have occasioned the injury complained of. (*Murphy v. Tp. of Oxford*, Ct. of App. Nov. 14, 1899, 2 C. & S. 20.) Nor on the ground that the drain as constructed does not bring about the results expected by the petitioners. (*McLennan v. Tp. of Elma* (1892) 1 C. & S. 62; *McQuat v. United Counties Stormont, &c.* (1906) 8 O.W.R. 40.)

FAILURE TO FENCE.—It is not negligence in law for a municipality to construct an uncovered drain, or a drain which is not protected by a fence, along one side of the travelled portion of a highway. If, therefore, a traveller, lawfully on the highway, falls into such unfenced or uncovered drain, the question whether the municipality is liable for the injury sustained resolves itself into a question of fact, to be determined upon the particular circumstances present in the case under consideration. (*MacKinlay v. City of Halifax* (1876) 2 Russ. & Chesley (N.S.) 305; *Lucas v. Tp. of Moore* (1878) 3 A.R. 602; and see *Binks v. South Yorkshire Ry. Co.* (1862) 3 B. & S. 244.)

NEGLIGENCE OF THIRD PARTIES.—A municipality which has initiated a drainage work is not answerable for such injuries as are sustained by parties during the construction of the work, through the negligent or wrongful conduct of independent contractors. (*Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429, at p. 447; *Elmore v. Drainage Commissioners* (1890) 135 Ill. 269). Or for negligent blasting by a property owner in making connection with the drain. (*Dallas v. Town of St. Louis* (1902) 32 S.C.R. 120).

Nor for injuries which proceed indirectly from the construction of the drain, but more directly from natural causes in the nature of vis major, as injury caused by an unusually heavy rainfall, or by

flood water from a stream backing up the drain and flooding the plaintiff's land. (*Garfield v. City of Toronto* (1895) 22 A.R. 128; *McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at pp. 419, 427; *McKenzie v. Tp. of W. Flamborough* (1899) 26 A.R. 198.)

LIABILITY FOR DAMAGES IN CASES WHERE ORIGINAL TOWNSHIP HAS BEEN SUBDIVIDED.—In the recent case of *Wigle v. Tps. of N. & S. Gosfield* (1904) 7 O.L.R. 302, the action was based upon injuries sustained by flooding, resulting from the construction of the drainage work in question without provision having been made for a sufficient outlet for the water collected by it. After the construction of the drain and before the injury complained of had been suffered, the original initiating township had been subdivided by Act of the Legislature into two new townships. The action was brought in the first instance against that township only within which the plaintiff's lands were situate. (*Wigle v. Tp. of Gosfield* (1900) 1 O.L.R. 519.) The Court thereupon referred back the action for the purpose of having the other township added as defendants, and subsequently held that the new townships were jointly liable for the injury sustained. See further upon this point the case of *Fairbairn v. Tp. of Sandwich S.* (1899) 2 C. & S. 133, cited above under sec. 68.

DAMAGE CAUSED BY OFFENSIVE MATTER CARRIED DOWN BY DRAIN.—A municipality upon which the obligation to maintain a drainage work is cast by the Act is liable for such injuries as naturally result from noxious or offensive matter being carried down and deposited upon adjoining lands by the water flowing through the drain. (*Van Egmond v. Town of Seaforth* (1883) 6 O.R. 599; *Close v. Town of Woodstock* (1892) 23 O.R. 99; *Lewis v. City of London* (1896) MacMahon, J. reported, *Coutlee's Dig. Unreported Cases* p. 162; and see *Clerk & Lindsell on Torts*, 4th Ed., pp. 382, 384; *Weber v. Town of Berlin* (1904) 8 O.L.R. 302. *Attorney General v. Acton Local Board* (1882) 22 Chy. Div. 221; *Brown v. Borough of Dunstable* (1899) 2 Chy. 378; *Watson v. Town of New Milford* (1900) 72 Conn. 561; *Munn v. City of Hudson* (1901) 61 N. Y., App. Div. 343.)

Where a drain which had been originally constructed under the provisions of the Act, was subsequently used as a common sewer, with the sanction of the municipality, it was held by a majority of the Judges of the Supreme Court that a householder making use of it for such purpose was not liable for nuisance at the outlet. (*Lewis v. Alexander* (1895) 24 S.C.R. 551). See however, on this point *Gibbins v. Hungerford* (1904) 1 Ir. Rep. Chy. 211. On the other hand, where it appeared that the deleterious matter had been deposited by a third party in the vicinity of the drain, without the knowledge or consent of the municipality, and was carried into it by infiltration, it was held that the municipality was not liable for the resulting injury. (*Gray v. Town of Dundas* (1886) 11 O.R. 317, aff. 13 A.R. 588.) Cameron C.J. said in this case (11 O.R. 317, at p. 319): "Here the injury is the result of the act of one individual or company, in using the otherwise harmless and beneficent work of the defendants."

DAMAGE CLAIMS ARISING FROM NEGLIGENCE OF THE STATUTORY DUTY TO REPAIR DRAINAGE WORKS.—The circumstances under which damages will be awarded against a municipality for injuries sustained through its neglect to perform its statutory duty of keeping a drainage work in repair are illustrated by the cases cited under section 73 above.

CIRCUMSTANCES UNDER WHICH SUCCESSIVE ACTIONS WILL LIE.—If the injury complained of is permanent in its nature damages must be sued for and recovered once for all. (*Whitehouse v. Fellowes* (1861) 10 C.B.N.S. 765; *City of North Vernon v. Voegler* (1885) 103 Ind. 314.) If, on the other hand, the injury is recurrent in character, as e. g. flooding due to an insufficient outlet, a new action may be brought as often as injury is sustained. (*Allen v. Michel* (1890) 38 Ill. App. 313; *Wigle v. Tps. of N. and S. Gosfield* (1904) 7 O.L.R. 302 at p. 314).

INJURY RESULTING FROM AN ACT OF A THIRD PARTY.—A municipality is not liable for injury sustained through the wrongful act of some third party, who without the knowledge or sanction of the municipality has obstructed or penned back the water flowing through the drain, and thereby either directly or indirectly occasioned the injury complained of. (*McConkey v. Town of Brockville* (1886) 11 O.R. 322; *Bryce v. Loutit* (1894) 21 A.R. 100.) Nor for injury from flooding, where the overflow was caused by the neglect of a ratepayer to perform his statutory duty of clearing obstructions from that portion of the drain which traverses his land. (*Danard v. Tp. of Chatham* (1875) 24 U.C.Q.B. 590. See also *Quick v. Parrott* (1906) 167 Ind. 31.)

LAWFUL USER OF A NATURAL WATERCOURSE.—If the flooding complained of has resulted from the lawful user by upper riparian proprietors of their right to drain into a natural stream or watercourse used as an outlet for a drainage work or as part of a drainage system the municipality is not liable. (*Law v. Town of Niagara Falls* (1884) 6 O.R. 467; *Tp. of Stephen v. Tp. of McGillivray* (1891) 18 A.R. 516, at p. 527; *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, at p. 449; *re Tp. of Elma & Tp. of Wallace* (1903) 2 O.W.R. 198, at p. 199; *Peatt v. Rhode* (1892) 2 B.C.R. 159.)

In *re Tp. of Elma & Tp. of Wallace* (1903) 2 O.W.R. 198, at p. 199, Moss C.J.O., in delivering the judgment of the Court of Appeal, said in this connection: "Owners of lands have drained them by means of tile and other under drains, as well as by surface drains, and the waters thus collected find their way to the stream. This is a right which as landowners they may lawfully exercise, and while they do so reasonably they are not subject to prevention or interference from others down the stream." The right of a riparian landowner to drain into a natural watercourse is not restricted to conducting the water to it in the same manner or direction as existed when the land was in a state of nature. It is sufficient if he does not conduct more water to the stream than would naturally find its way there. (*McCormick v. Horan* (1880) 81 N.Y. 86).

But landowners who are not riparian proprietors have no right of drainage *jure naturae* entitling them to use a natural watercourse as an outlet for a drain constructed under this or any other Drainage Act, and therefore, if a municipality authorizes the completion of a drainage work which empties into a stream of insufficient capacity to contain the additional water without overflow, it is answerable for the injury sustained. (*Tp. of Orford v. Tp. of Howard* (1900) 27 A.R. 223; *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, at p. 450; and see cases noted under section 3 (3) above.)

NO SERVITUDE OF DRAINAGE IN FAVOR OF HIGHER LANDS.—A lower proprietor is not bound by the common law of this Province to receive the surface water which drains off naturally from

the lands of upper proprietors, unless such water has made for itself a channel with defined banks and is of sufficient permanency of flow to constitute a legal watercourse. (*Murray v. Dawson* (1869) 19 U.C.C.P. 314; *McGillivray v. Millin* (1867) 27 U.C.Q.B. 62; *Crewson v. Grand Trunk Ry.* (1867) 27 U.C.Q.B. 68; *Darby v. Tp. of Crowland* (1876) 38 U.C.Q.B. 358; *Beer v. Stroud* (1888) 19 O.R. 10; *Williams v. Richards* (1893) 23 O.R. 651; *Arthur v. Grand Trunk Ry.* (1895) 25 O.R. 37; 22 A.R. 89; *Ostrom v. Sills* (1897) 24 A.R. 526, at p. 539, aff. 28 S.C.R. 485; *Wilton v. Murray* (1897) 12 Man. L. R. 35.) Such upper proprietors are not entitled to construct drains in the general course of such water and cause it to flow upon or through the adjoining lower lands, unless they can justify their acts under the provisions of some drainage Act. If therefore, a municipality assuming to act on their behalf constructs a drain without first having taken the proceedings necessary to vest jurisdiction in itself, or without the sanction of a valid by-law, any landowner whose land is traversed by such a drain may penn back the water and obtain an injunction restraining its use. (*Taylor v. Tp. of Collingwood* (1905) 10 O.L.R. 182. See also *City of Toronto v. Jarvis* (1894) 25 S.C.R. 237.) And in *Canadian Pacific Ry. Co. v. McBryan* (1899) 29 S.C.R. 359, reversing s. c. 6 B.C.R. 136, it was held by the Supreme Court that under the circumstances present in that case the defendant was not answerable for the damages sustained by the plaintiffs, as a result of his act in damming back from his land water which had been allowed to escape by an upper proprietor.

PLAINTIFF THE AUTHOR OF HIS OWN INJURY.—The plaintiff may have disentitled himself to the damages claimed, by his own conduct. In *Peltier v. Tp. of E. Dover* (1897) (1 C. & S. 323) it appeared that the flooding complained of had been caused by water backing up from the township drain through box drains which had been built by the plaintiff and thence onto his land. He had stood by and allowed the box drains to conduct the water to his property, although he might have easily blocked them up and averted the flooding complained of. Upon these facts, Referee Hodgins said: "I must therefore find that by his own act and therefore with his own consent the waters from the township drain flowed in upon his land and caused the damage of which he now complains." In *Filiatrault v. Village of Coteau Landing* (1902) Q.R. 23 S.C. 62, the Court held that as it had been possible for the plaintiff to reduce or wholly do away with the flooding complained of by an obvious and inexpensive method, namely, by constructing a short transverse drain, it was his duty to adopt it, and as he had not done so, he was entitled to recover only for such loss as he would have suffered if he had taken proper measures to prevent or diminish the damage.

ABSENCE OF SUFFICIENT PROOF OF CAUSE OF DAMAGE.—It is for the plaintiff to prove that the injury complained of has resulted from some wrongful act or neglect of duty on the part of the municipality. (*Noble v. City of Toronto* (1882) 46 U.C.Q.B. 519.) A recent action (*Swayzie v. Tp. of Montague* (1902) 1 O.W. R. 742) for damages caused by flooding was dismissed by Boyd C., owing to the absence of evidence that the injury had been caused by the defendant's act in building a new culvert which increased the rapidity though not the volume of the water passing through the drain.

WAIVER OF DAMAGE CLAIMS.—Before the commencement of drainage proceedings certain landowners in the proposed district executed a waiver of all claims for damages they might sustain by the construction of the work, which recited that it was of importance to them that the work should be proceeded with and that other property owners whose lands would be benefited declined to join in the proceedings unless claims for damages were waived. The Court held that the waiver was supported by valid considerations and that it was a bar to such claims being entertained. *Skagit County Drainage District v. Armstrong* (1906) 87 Pac. Rep. 52.

"A mandamus."

A Court will not grant a mandatory order which would needlessly hamper the defendant municipality. (*Fee v. Tp. of Ops*, Divl. Ct. Jan. 12, 1901. *Attorney General v. Acton Local Board* (1882) 22 Chy. Div. 221.)

In a case (*Northwood v. Tp. of Raleigh* (1882) 3 O.R. 347) where the desired improvement had at the time of hearing been already undertaken, Boyd C. decided that it would be sufficient to declare that the plaintiff was entitled to have the work completed within a reasonable time. But where a reasonable time for the completion of a drainage work had elapsed and a portion of the money had been diverted to other purposes outside the by-law, Ferguson J. granted an order directing the municipality to complete the drain as far as the amount levied under the by-law would extend. (*Smith v. Tp. of Raleigh* (1882) 3 O.R. 405.) If it does not clearly appear that the amount of the original assessment is sufficient to complete the drain, the Court will not direct that the unfinished work shall be done at the expense of the initiating municipality, but will leave all parties free to work out their respective rights under the assessment sections of the Act. (*Tp. of Sombra v. Tp. of Chatham* (1892) 21 S.C.R. 305, at p. 318.)

Where necessary a plaintiff may be granted a mandamus to enforce his rights under the Act, by virtue of the powers vested in the Courts by The Judicature Act. (*Williams v. Tp. of Raleigh* (1892) 21 S.C.R. 103, at p. 125.) A plaintiff may by petitioning for the distribution, and accepting his share, of the surplus money remaining in the treasury of the municipality after the cessation of work, or by other unequivocal conduct, be estopped from afterwards procuring an order to compel the completion of the drain as authorized by the by-law. (*Dillon v. Tp. of Raleigh* (1886) 13 A.R. 53, aff. 14 S. C.R. 739.)

Mandamus to compel the execution of necessary repairs to a drainage work is provided for by section 73 above, under which section the cases on this head will be found collected.

"An injunction."

The granting of an injunction is in the discretion of the Court, but it will generally be exercised in favor of the applicant where the injury complained of will be either continuous or frequently repeated or very serious. (Clerk & Lindsell on Torts, Canadian Ed., p. 785; *Taylor v. Tp. of Collingwood* (1905) 10 O.L.R. 182; *Brown v. Borough of Dunstable* (1890) 2 Chy. 378.)

In a case where the defendants asserted an unfounded right to continue depositing sewage upon the lands injured, the Court granted an injunction notwithstanding the lack of proof of substantial damages. *Atty. General v. Acton Local Board* (1882) 22 Chy. Div. 221.

Generally speaking, a Court will not enjoin a municipality from continuing to use a drainage work that has been constructed under a valid by-law, or under a by-law the validity of which has not been impeached, but will leave the claimant to his remedy in damages for any injury he may sustain. In *Wigle v. Tps. of Gosfield N. & S.* (1904) 7 O.L.R. 302, damages were claimed for injuries which arose as a consequence of the construction of the drain and an injunction was sought also. The Court decided that an injunction could not properly be granted, Maclellan J.A. saying (p. 316): "I see no ground of principle upon which an injunction can or ought to be awarded, the construction of the drain having been an act authorized by law." See also remarks of Moss C.J.O. to the same effect at p. 308. In a case where it appeared that the by-law was invalid (*Priest v. Tp. of Flos* (1901) 1 O.L.R. 78) an injunction was granted by the Court of Appeal restraining the municipality from continuing to bring down water upon the plaintiff's land to his injury, by the drainage work in question, but the operation of the injunction was suspended for a period of six months in order that the defendants might take such measures in the meantime as were necessary to prevent further injury. In an earlier case (*Malott v. Tp. of Mersea* (1885) 9 O.R. 611) the operation of an injunction was suspended for a year from the time of hearing. This was a case of insufficient outlet. The defendants had by their drain conducted water to a stream which ran through the plaintiff's land, with the result that the stream overflowed its banks and flooded the land. The plaintiff was held entitled to an injunction restraining the increased flow and the increased velocity of the water brought down. To the same effect see *Tp. of Patoka v. Hopkins* (1891) 131 Ind. 142.

In a case which turned upon an expropriation clause of The Municipal Act it was held that as the act complained of was clearly beyond the jurisdiction conferred upon the municipality, the plaintiff was entitled to an injunction without first moving to have the by-law set aside. (*Rose v. Tp. of W. Wawanosh* (1890) 19 O.R. 294.)

Where the injury complained of had ceased and the municipality undertook to prevent its recurrence Drainage Referee Britton refused an injunction. (*Seebach v. Tp. of Fullerton* (1892) 1 C. & S. 58) On it appearing that part of the fund raised for the construction of a drain had been misapplied, Ferguson J. granted the plaintiff an injunction restraining any further misappropriation of the money. (*Smith v. Tp. of Raleigh* (1882) 3 O.R. 405.)

"Shall be heard and tried by the referee only."

The effect of this provision, which dates from 1901, (1 Edw. VII. Ch. 30, sec. 4) taken in conjunction with the repeal of former section 94, by section 5 of the same Act, is to create an exclusive jurisdiction in the Referee over matters within the purview of the Act. (*McClure v. Tp. of Brooke* (1902) 5 O.L.R. 59, at p. 62; *Burke v. Tp. of Tilbury N.* (1906) 13 O.L.R. 225, at p. 231, cited above under section 89, *Bank of Ottawa v. Tp. of Roxborough* (1908) 11 O.W.R. 320, 1106)

Certain additional powers to investigate claims for damages or compensation similar to those covered by this section are conferred upon the Referee by section 6 of The Provincial Drainage Aid Act. (63 Vic. Ch. 8.)

"Proceedings.....shall.....be instituted by serving a notice."

If the by-law under which the municipality attempts to justify what would otherwise be a wrongful act is invalid, it would appear that a plaintiff might be awarded damages although no notice of claim has been given. (*McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at pp. 422, 425; But see *Burke v. Tp. of N. Tilbury* (1906) 13 O.L.R. 225, 8 O.W.R. 457.)

In *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, the Court of Appeal decided that a notice which stated that the claim was for damages sustained by reason of the construction and enlargement of the drain (naming it) through the plaintiff's land was sufficient, although it did not in express terms cover all the relief sought in the action, in the absence of anything to show that the defendants had been prejudiced thereby. In *Wigle v. Tps. of N. & S. Gosfield* (1904) 7 O.L.R. 302, at p. 304, Drainage Referee Rankin permitted the statements of claim to be amended and stand as notices of claim.

See Rules 6 & 7 of the Rules of Practice of Aug. 8th, 1903, regulating the mode of serving the notice of claim.

"Shall be filed."

It has been held that this provision is directory only. Where no injury had been occasioned the defendants by the plaintiff's failure to comply with this requirement, and no unnecessary time had been permitted to elapse between the time of injury and the commencement of proceedings, the Court of Appeal granted leave to file the notice after action brought. (*Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226.) In delivering his judgment in this case, Osler J.A. said (p. 238): "The objection chiefly relied on by the defendants is that the notice was not also filed...as required by that subsection. As to this I entirely agree with the learned referee that the provisions of that sub-section are directory only and that we cannot infer therefrom that the owner's right to compensation was intended by the Legislature to be dependent or conditional on an exact performance of its requirements."

"Within two years."

The time for filing and serving the notice was extended from one to two years by 1 Edw. VII. Ch. 30, sec. 4 (1901).

In considering the effect of this provision in the recent case of *Wigle v. Tps. of N. & S. Gosfield* (1904) (7 O.L.R. 302) Moss C.J.O. said at p. 308; "From this provision it follows, that all claims for injuries not made and prosecuted in the manner and within the period prescribed are barred. Any subsequent claim cannot embrace damages suffered at an earlier date than two years next preceding it." And in the same case MacLennan J.A. said (p. 314): "The new section 93 is made expressly applicable to all claims in or consequent upon construction, as well as to claims for maintenance or want of repair, and indeed to all sorts of damage claims, and the limitation in all damage cases is now by that section two years."

TIME FROM WHICH PRESCRIPTIVE PERIOD COMMENCES.—In *Whitehouse v. Fellowes* (1861) 10 C. B. N. S. 765, an action for damages for overflow from a ditch, it was held that where a statute limits a period within which an action is to be brought for an act done or committed, if the cause of action be a single act or one which amounts to a trespass (except it be a continuing trespass)

the action must be brought within the prescribed period after the actual doing of the thing complained of, but if the cause of action be not the doing of the thing, but the resulting damage only, the period of limitation is to be computed from the time when the plaintiff sustained the injury complained of.

The Court of Appeal were called upon, in *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, to determine the time from which the prescriptive period of two years began to run, where the damages claimed arose out of the taking of land and its injury and severance in the construction of the drain. The Court held that claims of this nature must be prosecuted within two years from the completion of the drain, MacLennan J.A. saying (p. 241): "A drain such as this is not like a sewer constructed of brick or cement, and does not become the property of the municipality, and the cause of complaint to the landowner arises when the work is complete, and when the municipality has done all it intends to do for his protection." In the more recent case of *Wigle v. Tps. of N. & S. Gosfield* (1904) 7 O.L.R. 302 the claim was for injury sustained by flooding through the insufficiency of the outlet into which the waters of the drain were emptied. The Court of Appeal held, in agreement with the following citation from the judgment of MacLennan J.A. (p. 314) that: "The damage or injury whenever it occurs is the cause of complaint in such cases... therefore although the work was done as long ago as 1887, the claimants are entitled to recover for any injury or damage suffered by reason of the original construction, which has occurred within two years...." In the same case Moss C.J.O. said (p. 308): "The damages sustained in this case are, therefore, not to be put on the basis of lands taken, in which case there would be compensation once for all. But the injury is one that in its nature is recurrent, and such as that successive actions or claims for the damages sustained from time to time may be brought. And unsatisfactory as that mode of relief may appear, it seems to be the only one left open to the claimants by the legislation." Further reference upon this point may be made to *Harvey v. Railroad Co.* (1906) 129 Iowa 465, and *Allen v. Michel* (1890) 38 Ill. App. 313, which are in agreement with the above citations.

JURISDICTION OF REFEREE IS NOW EXCLUSIVE.—By section 94 of R.S.O. 1897, ch. 226 (repealed) power was conferred on a Court or a Judge to refer any action for damages to the Drainage Referee at any stage of the action. (*Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, per Osler J.A., at p. 231; *Sage v. Tp. of W. Oxford* (1892) 22 O.R. 678.) By its repeal in 1901 (1 Edw. VII. Ch. 30, sec. 5) this power was taken away. (*McClure v. Tp. of Brooks* (1902) 5 O.L.R. 59, at p. 62.) Claims for damages falling within the exclusive jurisdiction now conferred upon the referee by section 93 must accordingly be tried by him alone. (*Burke v. Tp. of Tilbury N.* (1906) 13 O.L.R. 225, at p. 231; *Bank of Ottawa v. Tp. of Roxborough* (1908) 11 O.W.R. 320, 1106.) And matters which are beyond such exclusive jurisdiction can be referred to him as a special referee under The Arbitration Act (R.S.O. 1897, Ch. 62, sec. 28) only upon consent of all parties. (*McClure v. Tp. of Brooks* (1902) 5 O.L.R. 59.)

94. The decision of the referee in all applications and proceedings under this Act, not otherwise provided for as being final and conclusive between the parties shall be subject to appeal to the Court of Appeal for Ontario and the decision thereon shall be final, conclusive and binding upon all parties to the application or other proceeding. 1 Edw. VII., c. 30, s. 5.

"Appeal to the Court of Appeal."

It is now expressly provided by 4 Edw. VII. Ch. 11, sec. 2(2), (1904), *An Act to amend The Judicature Act*, that the Court of Appeal shall have jurisdiction to hear appeals from decisions under *The Municipal Drainage Act*.

NO APPEAL TO THE SUPREME COURT.—It would seem to be quite clear that the effect of the enactment of this section in 1901, together with the alterations in procedure introduced by the new section 93 in the same year, has been to exclude any appeal to the Supreme Court. The wording of the section is unambiguous, and even apart from the express inhibition, the provisions of the Supreme Court Act would exclude an appeal. This Act provides (R.S.C. 1906, Ch. 139, secs. 35 to 49 inc.), with some exceptions which do not affect the point at issue, that appeals to that Court shall be limited to cases in which the court of original jurisdiction is a superior court. It has been held by the Supreme Court in cases which arose prior to 1901, (*re Tp. of Raleigh & Tp. of Harwich* (1895) Cassels' Sup. Ct. Practice (2nd Edn.) p. 22, Cameron's Supreme Court Practice 1907, p. 112; *Young v. Tucker* (1899) 18 P.R. 449, reversed 30 S.C.R. 185) that no appeal would lie where the case or proceeding originated before the Referee. As section 93 now expressly forbids the institution of drainage proceedings before any other tribunal than that of the Referee, a case originating under the Act cannot now reach the Supreme Court. See also *Waters v. Manigault*, (1900) 30 S.C.R. 304.

Assessing
damages and
costs payable
by municipi-
palities

95. (1) Save as provided by subsections 2 and 3 of the section all damages and costs payable by a municipality and arising from proceedings taken under this Act shall be levied *pro rata* upon the lands and roads in any way assessed for the drainage work according to the assessment thereof for construction or maintenance, and may be assessed, levied and collected in the same manner as rates assessed, levied and collected for maintenance under this Act.

(2) Where such damages and costs become payable owing to any improper action, neglect, default or omission on the part of the council of any municipality or of any of its officers in the construction of the drainage work or in carrying out the provisions of this Act, the Referee or Court may direct that the whole

or any part of such damages and costs shall be borne by such municipality and be payable out of the general funds thereof.

(3) Where in any such proceedings by or against a municipality an amicable settlement is arrived at and carried out by the advice of counsel, the damages and costs payable under the terms of such settlement by any municipality shall be borne and paid as directed by the Referee on application to him on behalf of the council of the municipality or any owner of lands assessed for the construction or maintenance of the drainage work, and in making such direction the Referee shall have regard to the provisions of the next preceding subsection. R.S.O. 1897, c. 226, s. 95.

"All damages arising from proceedings taken under this Act."

All sums awarded by way of compensation for lands taken or injured by the construction of a drain, and all claims allowed for damages necessarily resulting from the digging of the drain, but not such as are founded on negligence, are to be apportioned and levied as provided by this sub-section. (*Re Byrne & Tp. of Rochester* (1889) 17 O.R. 354; *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 237; *Wigle v. Tp. of S. Gosfield* (1901) 1 O.L.R. 519, at p. 521; *Wigle v. Tps of N. & S. Gosfield* (1904) 7 O.L.R. 302, at p. 313; *re McClure & Tp. of Brooke* (1905) 11 O.L.R. 115.)

In considering the effect of this sub-section Osler J.A. said (*Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 237): "The proper procedure evidently is to assess the lands for whatever sum they appear to be benefited—the work of the engineer and Court of Revision—and to allow the owner his damages, less any advantage he derives from the work, from which advantage may be deducted the special assessment, since to that amount the owner is already liable to pay for the improvement—the work of the . . . referee. Any sum thus allowed to the owner is then chargeable *pro rata* under section 95 upon all the lands liable to assessment for the drainage work."

In *re Byrne & Tp. of Rochester* (1889) 17 O.R. 354, it was held by a Divisional Court that the amount awarded a landowner by way of compensation for land taken for the drain, for severance, and for constructing necessary farm bridges across the drain, was to be apportioned and assessed as provided by this sub-section. A damage claim which is based on injury sustained by flooding as a result of the insufficiency of the outlet provided for the waters of the drain, if allowed, is to be distributed *pro rata* upon the assessed lands and roads. (*Wigle v. Tp. of S. Gosfield* (1901) 1 O.L.R. 519, at p. 521; *Wigle v. Tps. of N. & S. Gosfield* (1904) 7 O.L.R. 302.)

"And costs."

In *Rhodes v. Tp. of Raleigh* (1898) (2 C. & S. 141) Referee Hodgins directed that the defendants' costs should be levied upon the lands and roads assessed for the construction of the drain.

Where a township withdrew its consent to the purchase of a dam under section 80, as it was held entitled to do before the by-law was passed, and the proceedings thereupon came to an end, Referee Hodgins ordered that the withdrawing township should indemnify the initiating township against the expenses incurred, and that they should be levied *pro rata* upon the lands and roads assessed for the drainage work in the withdrawing township. (*Tp. of Augusta v. Tp. of Oxford* (1897) 1 C. & S. 345.)

"Upon the lands and roads in any way assessed for the drainage work."

This phrase came before the Court of Appeal for consideration in the recent case of *re McClure & Tp. of Brooke* (1905) (11 O.L.R. 115). The plaintiff's land had been injured by flooding from a defective drain. After the happening of the injury complained of, a by-law was passed for the improvement of the outlet drain and it was proposed to levy upon the lands assessed for the new work a proportion of the damages awarded. The Court held that such an assessment was unauthorized. Moss C.J.O., in delivering the judgment of the court, said (p. 117) : "The intention can hardly be imputed to the Legislature of proposing by the use of the words 'lands and roads in any way assessed for construction or intenance' to include a charge against lands brought in or made to contribute to the cost of other drainage work not contemplated or in existence at the time when the damages accrued, and the carrying out of which contributed in no measure to them. These words of the section may fairly be restricted so as to impose the liability there mentioned on the lands and roads assessed for the drainage work to which the damages are attributable, that is, the then existing system."

If a municipality has proceeded under a void by-law, it would appear to be obliged to pay out of its general funds all damages recovered against it, and that it could not charge such amounts against the assessed lands. (*McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at pp. 426, 428.)

"Any improper action, neglect, default or omission."

Every act done under a void by-law would, presumably, be an improper action, and it would follow that damages recovered in such a case should be chargeable against the general funds of the initiating municipality. (*McCulloch v. Tp. of Caledonia* (1898) 25 A.R. 417, at pp. 426, 428.)

"Neglect."

In *Tp. of Sombra v. Tp. of Chatham* (1897) (28 S.C.R. 1) the Court was called upon to determine whether a municipality could under the preceding sub-section justify its attempt to levy upon the property of the assessed ratepayers a sum sufficient to reimburse itself for the amount of a judgment and costs awarded against it in a former action. The earlier action (*Tp. of Sombra v. Tp. of Chatham* (1891) 18 A.R. 252; 21 S.C.R. 305) had been brought by a landowner for injuries sustained by flooding, due as the Court found, to the failure of the municipality to complete a drainage work for which a sufficient sum had been assessed. It was held that it could not. Gwynne J., who delivered the judgment of the Court, said (p. 34) : "It has been argued that the policy of the clauses of the Acts relating to drainage works is that the lands assessed under the by-law authorizing the construction of such works should

bear and pay all charges attending the construction and maintenance of the works. That undoubtedly is so . . . in so far as all necessary expenses are concerned and all expenses which are required to compensate parties injured by the works from causes consequential upon and incidental to the construction of this work : accordance with the by-law authorizing its construction, but neither the policy of the law nor the language of the Act goes any further, and in the present case the acts of the defendants which constituted the ground for the former action were acts which were not authorized by such by-law but were in fact acts done in actual contravention of it, and upon no principle of law can those who supplied the defendants with all the money necessary to complete the work as authorized by the by-law be charged with the damages, costs and liabilities incurred by the defendants as wholly consequential upon their own wrongful acts."

The recent action of *Bradley v. Tp. of Raleigh* (1905) (10 O.L.R. 201) was based upon injuries sustained by flooding as a result of the negligent operation of a pumping plant which formed part of the defendants' drainage system. MacLennan J.A., in delivering the judgment of the Court of Appeal, said (p. 207) : "I also agree with the referee in imposing on the general funds of the township one-half of the damages and costs awarded to the plaintiff, and the other half upon the area benefited, although as regards the costs, there seems to be an inconsistency between section 73(c) and section 95(2). I should have thought it more just in a case like the present to impose the whole upon the general funds, in which case the area would still have to contribute a share. The area is not represented before us except by plaintiff, and she does not complain of this part of the judgment."

PROCEEDING WITH REFERENCE.

96. (1) The Referee at any time after an appeal or reference is made to him as hereinbefore provided, may give directions for the filing or serving of objections and defences to such appeal or reference and for the production of documents and otherwise, and may give an appointment to either or any party to the appeal or reference, to proceed therewith at such place and time and in such manner as to him may seem proper, but the hearing shall be in the county or one of the counties in which the drainage work or proposed drainage work is situate or in which lands are assessed.

Referee to direct procedure.

(2) The Clerk of the County Court shall be the Clerk of the Court of the Referee, and shall take charge of and file all the exhibits and shall be entitled to the same fees for filings and for his services and for certified copies of decisions or reports as for similar services in the County Court; which fees shall be paid in money and not by stamps.

Clerk of Court.

Referee's
clerk.

(3) In the absence of the Clerk of the County Court the Referee may appoint the Referee's clerk or some other person to act as Deputy Clerk of the County Court for the purpose of the trial and for taking charge of and filing all exhibits, and the person so appointed shall while so acting have the same power and be entitled to the same fees as the Clerk of the County Court would have and be entitled to if personally present.

Subpoenas.

(4) County Court subpoenas for the attendance of witnesses at the hearing, tested in the name of the Referee may be issued by the Clerk of the County Court of the county in which the case is to be heard. R.S.O. 1897, c. 226, s. 96.

"May give directions."

See now Rule 19 of the Rules of Practice of Aug. 8th, 1903.

When referee
proceeds on
view or special
knowledge.

97. When the Referee proceeds partly on view or on any special knowledge or skill possessed by himself, he shall put in writing a statement of the same sufficiently full to allow the Court of Appeal to form a judgment of the weight which should be given thereto; and he shall state as part of his reasons the effect by him given to such statement. R.S.O. 1897, c. 226, s. 97.

"Proceeds partly on view."

By section 89(2) the Referee is required to appoint the time for his inspection. It has been held that the parties or their solicitors should have notice of the intended inspection, (*McKim v. Tp. of E. Luther* (1901) 1 O.L.R. 89) and that where the Referee made his inspection without notice to them and in their absence, his statement as to the condition of the drain should be disregarded, but that his decision should be allowed to stand if supported by the other evidence.

"Shall put in writing."

In, *re MacPherson & City of Toronto* (1895) (26 O.R. 558) it appeared that the arbitrator had taken a view of the premises in question, but that he had omitted to state in writing in his award that he had proceeded on such view. Under these circumstances Street J. said: "I am inclined to think that in such a case the Court should consider only the evidence taken before him, and should not give any greater effect to his findings than if he had not viewed the premises." But it has been said again that under such circumstances the Appellate Court might remit back the case for a rehearing, if there was not sufficient other evidence upon which to base a judgment. (*Re Roden & City of Toronto* (1898) 25 A.R. 12, at p. 17).

98. Two or more shorthand writers may from time to time be appointed by the Lieutenant-Governor in Council to report hearings or trials before the Referee, and every such officer shall be deemed to be an officer of the High Court, and shall be paid in the same manner as shorthand writers in the High Court are paid and the several sections of *The Judicature Act* respecting shorthand writers shall apply to any shorthand writer appointed under this Act. R.S.O. 1897, c. 226, s. 98; 6 Edw. VII., c. 37, s. 7.

Shorthand
writer.

Rev. Stat. c.
51.

99. The decision or report of the Referee on appeals from assessment or on claims for damages or compensation under section 93 with the evidence, exhibits, the statement (if any) of inspection or of technical knowledge and the reason for his decision shall be filed in the office of the clerk of the County Court aforesaid, and notice of the filing shall forthwith be given by the clerk, by post or otherwise, to the solicitors of the parties appearing by solicitor, and to other parties not represented by a solicitor, and also to the clerk of the municipality or other corporation. R.S.O. 1897, c. 226, s. 99.

Clerk of Court
to forward
notice of filing
report, etc., to
parties.

100. A copy of the decision or report certified by the Referee or Clerk aforesaid, shall be sent or delivered to the clerk of every municipality interested in the drainage work in question upon receipt of the sum chargeable therefor, as hereinbefore provided and shall be kept on file as a public document of the municipality. R.S.O. 1897, c. 226, s. 100.

Report to be
sent to clerk
of each munici-
pality inter-
ested.

101. The decision of the Referee in all cases other than appeals from assessment or on claims for damages or compensation under section 93 of this Act, shall be in the form of an order for judgment and may be delivered as decisions by the Judges of the Supreme Court of Judicature are, and need not be in the form of a report; and unless appealed from to the Court of Appeal, as herein provided, judgment may be entered in the proper office without any further or other application or order. R.S.O. 1879, c. 226, s. 101.

Decision to be
in form of
order for
judgment.

"Unless appealed from."

See section 110 below and cases cited there.

Use of court
house.

102. When an appointment is given by the Referee for the hearing of any matter of reference under this Act in any city, town or place wherein a court house is situated, he shall have in all respects the same authority as a Judge of the High Court in regard to the use of the court house, or other place or apartments set apart in the county for the administration of justice. R.S.O. 1897, c. 226, s. 102.

Sheriffs, etc.,
to assist
referee—fees
therefor.

103. Sheriffs, deputy-sheriffs, constables and other peace officers shall aid, assist and obey the Referee in the exercise of the jurisdiction conferred by this Act whenever required so to do, and shall, upon the certificate of the said Referee, be paid by the county or counties interested, like fees as for similar services at the sittings of the High Court for the trial of causes. R.S.O. 1897, c. 226, s. 103.

Rules and
practice.

104. Except as in this Act otherwise provided and subject to the provisions thereof, the rules and practice for the time being of the High Court of Justice shall be followed so far as the same are applicable. R.S.O. 1897, c. 226, s. 104.

"The rules and practice."

By section 112 power is conferred upon the Referee "to frame rules regulating the practice and procedure to be followed in all proceedings before him." By section 111 authority to make general rules "with respect to proceedings before the Referee and appeals from him" is conferred upon the Judges of the Supreme Court of Judicature for Ontario. A set of rules framed by the Referee under the authority of section 112 and duly approved was published in The Ontario Gazette of Aug. 8th, 1903, and is now in force.

Evidence
taken before
referee need
not be filed or
written out.

105. In cases brought before the Referee in pursuance of the powers conferred by this Act, or by any other Act, the evidence taken before him need not be filed, and need only be written out at length by the shorthand writer, if required by the Referee or by any parties to the reference; and if required by any of the parties to the reference, copies shall be furnished upon such terms as may be fixed by the Lieutenant-Governor in Council. R.S.O. c. 226, s. 105.

106. Costs shall be taxed by the Referee; or he may direct the taxation thereof by the Clerk of the County Court with whom the papers are filed, or by any taxing officer of the High Court. R.S.O. 1897, c. 226, s. 106.

Taxation of costs.

"Costs shall be taxed by the Referee."

Two drainage actions brought in the first instance in the High Court were referred at the trial to the Referee, from whose report an appeal was taken to the Court of Appeal and subsequently to the Supreme Court. The last mentioned Court directed that costs be taxed and allowed the successful litigants. Me edith J. held that on the appeal the actions reverted to the ordinary courts of law, and that the meaning of this direction was that costs should be taxed by the proper taxing officer and not by the referee, and that an appeal would lie from such taxation as in ordinary cases. (*Crooks et al. v. Tp. of Ellice* (1894) 16 P.R. 553.)

As to whether an appeal will lie to a Judge of the High Court from a taxation of costs by a clerk of a County Court, under a direction from the Referee, see *Fewster v. Tp. of Raleigh* (1895) 31 C.L.J. 287; 15 C.L.T. Occ. N. 137, and *Tindell v. Tp. of Ellice* (Rose J.) June 28th, 1895, where the point arose but was not determined.

107. Fees shall be paid in stamps or otherwise in the same manner as in the case of other proceedings in the said courts respectively, until other provision is made in that behalf by competent authority. R.S.O. 1897, c. 226, s. 107.

Fees, how payable.

108. To provide a fund for or towards the payment of the Referee's salary and other expenses, there shall be further payable a sum which shall be determined by the Referee and mentioned in his decision or report or in a subsequent report; the said sum not to exceed the rate of four dollars a day for every full day the trial occupies, and shall be paid in stamps by one or the other of the parties, or distributed between or among the parties as the Referee directs. R.S.O. 1897, c. 226, s. 108.

Referee's fees.

109. The decision or report of the Referee shall not be given out until stamped with the necessary stamps. R.S.O. 1897, c. 226, s. 109.

Reports to be stamped.

Time for
appealing to
Court of
Appeal.

Rev. Stat.,
c. 62.

110. The decision or report of the Referee, on any appeal or reference under this Act, or on a reference under sections 28 or 29 of *The Arbitration Act* or in any action or proceeding transferred or referred to him under this Act shall be binding and conclusive upon all parties thereto, unless appealed from to the Court of Appeal within one month after the filing thereof, or within such further time as the Referee or the Court of Appeal or a Judge thereof may allow, save as otherwise provided by this Act in any case where it is declared that the decision of the Referee shall be final. The decision or report may be appealed against to the Court of Appeal in the same manner as from a decision of a Judge of the High Court sitting in Court. R.S.O. 1897, c. 226, s. 110.

"On a reference under *The Arbitration Act*."

The power which was formerly vested in the Court or a Judge to refer any action for damages to the Referee for trial was taken away by the repeal of former section 94 in 1901.

No proceeding or action can now be referred to the Referee except upon the consent of all parties. (*McClure v. Tp. of Brooke* (1902) 5 O.L.R. 59.) In this case, Osler J.A., in delivering the judgment of the Court of Appeal, said (p. 62): "This section is not one dealing with his jurisdiction, but with appeals from his decisions, and (if this part of it is still in force now that section 94 of the Act has been repealed by 1 Edw. VII. Ch. 30, sec. 5) it may embrace the case of a decision or report of the Referee acting as special Referee by consent of the parties. It goes no further."

"Within one month."

The rules governing appeals from the High Court to the Court of Appeal are to regulate as far as possible appeals taken from decisions of the Referee. Christmas vacation is therefore to be excluded in computing the month within which an appeal must be made, and security for the costs of the respondent on the appeal must be given as in ordinary cases. (*Re Tp. of Raleigh & Tp. of Harwich* (1898) 18 P.R. 73.)

A referee's report stands confirmed when the time for appealing has elapsed, and unless an appeal is entered within the prescribed period of time it is too late. The report must be filed by the appellant before the appeal can be brought, but the time is not to be extended by his delay in filing it. *Valad v. Tp. of Colchester South* (1895) 24 S.C.R. 622.

RULES AND TARIFF OF COSTS.

Judges of
Supreme
Court may
make rules.

111. The Judges of the Supreme Court shall have the same authority to make general rules with respect to proceedings before the Referee and appeals from

him as they have with respect to proceedings under *The Judicature Act*; and sections 122 to 125 of *The Judicature Act* shall apply thereto. R.S.O. 1897, c. 226, s. 111. Rev. Stat.,
c. 51.

112. (1) Subject to any such general rules the Referee shall have power, with the approval of the Lieutenant-Governor in Council, to frame rules regulating the practice and procedure to be followed in all proceedings before him under this Act, and also to frame tariffs of fees in cases not governed by the County Court tariff. Referee may
make rules.

(2) Such rules and tariffs, whether made by the Judges or the Referee, shall be published in the *Ontario Gazette* and shall thereupon have the force of law, and the same shall be laid before the Legislative Assembly, at its next Session after promulgation thereof. R.S.O. 1897, c. 226, s. 112.

The rules of practice framed by the Referee under the authority conferred by this section were published in *The Ontario Gazette* of Aug. 8th, 1903, and will be found printed below.

113. Until other provisions are made under the last two preceding sections the tariff of the County Court shall be the tariff of costs and of fees and disbursements for solicitors and officers under this Act and the Referee shall have the powers of a County Judge with respect to counsel fees, and may also allow further counsel fees in case of a trial occupying more days than one. R.S.O. 1897, c. 226, s. 113. Tariff of
County Court
adopted until
rules made.

"Until other provisions are made."

COSTS.—It is now provided by rule 34 of the Rules of Practice that: "Costs shall be taxed and allowed on the scale of the High Court, County Court or Division Court as the Referee shall direct in his decision or report."

COSTS OF APPEAL.—It has been held by the Court of Appeal, (*re Tp. of Metcalf v. Tps. of Adelaide & Warwick* (1901) 2 O.L.R. 103), reversing the judgment of a Divisional Court (19 P.R. 188) that the costs of an appeal to the Court of Appeal from the decision of a Referee should be taxed on the scale applicable to appeals from Judges of the High Court, and not on the scale governing appeals from a County Court.

The following cases were determined before the present rules were brought into being and should now be read subject to rule 34 above. In *Fewster v. Tp. of Raleigh* (1895) 31 C.L.J. 287; 15 C.L.T. Occ. N. 137, and in *Moke v. Tp. of Osnabruck* (1900) 19 P.R. 117, it was held in each case by Armour C.J.O. that the costs of an action which had been brought in the High Court and had been referred by the Court to the Drainage Referee for trial, were properly taxed, as directed by the Referee, on the County Court scale. In 1899, the Court of Appeal decided (*McCulloch v. Tp. of Caledonia* (1899) 19 P.R. 115) that if the action was one that might have properly been litigated in the High Court, but which had for purposes of convenience been referred to the Referee for adjudication, under the authority of former section 94, section 113 did not apply, and that as a result the successful party was entitled to have his costs taxed on the High Court scale.

Where the appellant succeeded only in part the Court in its discretion allowed no costs of the appeal to either party. (*Stephens v. Tp. of Moore* ((1898) 25 A.R. 42.)

On the appeal of the defendant township in *Challoner v. Tp. of Lobo* (1901) (1 O.L.R. 292) the Court reversed the judgment of the lower Court, which had granted an injunction and costs against the township and against the contractor. The contractor did not appeal. It was held that the result of allowing the appeal of the corporation was that the action must be dismissed against both defendants, but that the contractor could have no costs of the appeal.

114. All parts of Acts inconsistent with this Act are hereby repealed. 1 Edw. VII., c. 30, s. 6.

(NOTE. Schedule A to the Act, the form of petition for drainage work will be found under sec. 3 (1) above, and Schedule B, the form of By-law, under sec. 20.)

RULES OF PRACTICE UNDER THE MUNICIPAL DRAINAGE ACT (Ontario).

The following rules framed by the Referee for regulating the practice and procedure to be followed in all proceedings before him, under The Municipal Drainage Act, under the authority of section 112 of the said Act, and approved by the Lieutenant-Governor-in-Council were published in the Ontario Gazette on the 8th day of August, 1903.

(1) These rules shall take effect on the first day of September, 1903.

(2) As to all matters not provided for by these rules and by "The Municipal Drainage Act" the rules and practice for the time being of The High Court of Justice shall be followed so far as the same are applicable.

(3) The provisions of "The Interpretation Act" and the interpretation clauses of "The Judicature Act" and "The Municipal Drainage Act" shall apply to these rules unless there is anything in the subject or context repugnant thereto.

(4) In these rules "Referee" shall mean the Referee for the time being appointed for the purpose of the Drainage laws pursuant to the provisions of "The Municipal Drainage Act."

(5) Unless otherwise directed by the Referee the trial of all assessment appeals, claims for damages, motions against by-laws and other applications under the Act, except for directions, shall be held at the Court House of the county or city in which the drainage work or proposed drainage work is situated, and if situated in more than one county, then in the Court House of the county or city in which the municipality initiating the work in question is situated.

(6) A notice claiming damages, a notice of motion or other document by which an appeal, matter or proceeding may be commenced under "The Municipal Drainage Act" shall be deemed to have been properly served if the defendant by his solicitor accepts service and undertakes to appear.

(7) Where under section 93 of "The Municipal Drainage Act" service is required to be made upon a municipal corporation it may be made on the head or the clerk thereof.

(8) Where by "The Municipal Drainage Act" it is provided that an affidavit of service of a copy of a notice of appeal or of any other notice shall be filed with the county court clerk, an acceptance of service by a solicitor or firm of solicitors duly verified may be filed in lieu of such affidavit.

(9) In all proceedings before the Referee the following style of cause shall be sufficient.

IN THE HIGH COURT OF JUSTICE

IN THE MATTER OF THE MUNICIPAL DRAINAGE ACT

Between A. B., Plaintiff and C. D., Defendant.

(10) Where the plaintiff institutes any proceedings by a solicitor the notice of appeal or other initiating notice shall contain by endorsement or otherwise the solicitor's name or firm and place of business where notices, orders, appointments and other documents, proceedings and written communications may be served.

(11) (1) Where a plaintiff institutes any proceedings in person the notice of appeal or other initiating notice shall contain by endorsement or otherwise his place of residence and occupation. (2) If his place of residence is more than two miles from the office of the clerk of the county court of the county in which the municipality initiating the drainage work in question is situated there shall be stated also another proper place which shall not be more than two miles from such office, to be called his address for service, where notices, orders, appointments and other docu-

ments, proceedings and written communications may be served. (3) If the requirements of this rule are not complied with the opposite party shall be at liberty to proceed by posting up in the office of the Clerk of the County Court all notices, orders, appointments and other documents, proceedings and written communications requiring service.

(12) Every notice initiating proceedings to which an appearance is required to be entered shall be endorsed with a notice requiring an appearance to be entered in the proper office and that in default the defendant will not be entitled to notice of any further proceedings. Such notice may be in the form following—

TAKE NOTICE that you are required within ten days after the service of this notice on you inclusive of the day of such service, to cause an appearance to be entered for you in the office of the Clerk of the County Court of the County of _____ and in default of your so doing you will not be entitled to notice of any further proceedings herein.

(13) A defendant served with any notice of appeal or any notice under section 93 of the Municipal Drainage Act, other than a notice of motion on applications, shall appear within ten days including the day of service.

(14) A defendant shall appear by fying with the Clerk of the County Court in whose office the notice of appeal or other notice has been fyled, a memorandum in writing stating if the defendant appears by solicitor, the name and place of business of such solicitor, or if the defendant appears in person stating that such defendant so defends in person and giving his address and naming a place to be called his address for service which shall not be more than two miles from the office where the appearance is required to be entered.

(15) If the memorandum does not contain the address of the solicitor or the defendant (as the case may be) it shall not be fyled; and if such address is illusory or fictitious the appearance may be set aside

by the Referee and thereafter unless otherwise ordered the plaintiff may proceed as if the defendant had not appeared.

(16) Upon a memorandum of appearance being fyled the officer shall forthwith note the same in the procedure book.

(17) A defendant may appear at any time before judgment. If the defendant appears after the time limited for appearance he shall forthwith give notice thereof, and if he appears after the time appointed and omits to give such notice the plaintiff may proceed as in case of non-appearance.

(18) In default of appearance the party in default shall not be entitled to notice of any further proceedings other than by posting up in the office where the appearance is required to be entered.

(19) Either party shall be at liberty as soon as the defendant has appeared or the time for appearing has expired to apply to the Referee on two clear days' notice to the opposite party for a general order fixing the procedure to be followed, and upon such application the Referee shall, unless there is some good reason for postponing the giving of directions as to any particular proceedings, make a general order directing all the subsequent proceedings down to the inspection to be taken by all parties and fixing the times therefor. And the several provisions of such general order shall be carried out by praecipe orders issued by the clerk of the County Court in whose office the general order is fyled.

(20) A copy of the general order and of any other orders and appointments made by the Referee shall be forthwith served upon the opposite party and fyled with the clerk in whose office the proceedings are pending.

(21) The party instituting the proceedings shall at least one clear day before the trial deposit with the clerk for the use of the Referee a copy certified by the clerk of the notice initiating the proceedings, all de-

fences and objections to the appeal or reference and any other papers fyled showing the issues to be tried.

(22) Upon the trial of appeals under section 63 of The Municipal Drainage Act it shall be the duty of the initiating municipality to produce the original report, plans, specifications, assessments and estimates of the engineer or surveyor and the provisional by-law in question, and also to produce the engineer or surveyor for cross-examination.

(23) Unless otherwise directed the plaintiff or party appealing shall begin and after the evidence in defence shall have the right to reply.

(24) Upon application under section 93 of The Municipal Drainage Act copies of affidavits upon which the notice of motion is based shall be served with the notice, and in the absence of directions to the contrary, affidavits in defence shall be fyled and served within ten days thereafter and affidavits in reply shall be fyled and served within ten days after the service of the affidavits in defence.

(25) After service of a notice of motion either party may apply to the Referee on two clear days' notice to the opposite party, for directions as to the procedure on the motion, and a copy of the Referee's order shall be forthwith served upon the opposite party and fyled with the clerk in whose office the affidavits are fyled.

(26) Whenever during the progress of an appeal, reference or application the Referee requires a copy of any evidence taken by the stenographer, the same shall be supplied by the party initiating the proceedings and unless otherwise ordered the costs thereof shall be taxed in the cause.

(27) Unless the Referee so directs non-compliance with the rules shall not render notice or any other act or proceedings void, but the same may be set aside either wholly or in part as irregular or amended, or otherwise dealt with as to the Referee may seem just.

(28) An application to set aside any proceeding for irregularity shall be made within a reasonable

time, and shall not be allowed if the party applying has taken a fresh step after knowledge of the irregularity.

(29) Every county court clerk shall at the request of any party, and upon receiving a praecipe for the purpose and payment of the necessary postage and express charges for the transmission and return of the same, transmit to the Referee the proceedings on file in his office.

(30) Unless the Referee gives leave to the contrary there shall be at least two clear days between the service of a notice of motion and the day for hearing and in the computation of such two clear days Sundays and days on which the offices are closed shall not be reckoned.

(31) The Referee may enlarge or abridge the time appointed by these rules or fixed by order for doing any act or taking any proceedings upon such terms as may seem just, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

(32) Unless by consent, or in case of urgency, by leave of the Referee, no trial shall take place or motion be heard during the "long vacation" or the "Christmas vacation" observed by the High Court of Justice.

(33) Unless otherwise directed costs shall be taxed by the clerk of the County Court with whom the papers are fyled.

(34) Costs shall be taxed and allowed on the scale of the High Court, County Court or Division Court as the Referee shall direct in his decision or report.

(35) Where costs are allowed the Referee shall fix the amount of counsel fees to be taxed.

(36) The clerk of the County Court shall, upon request by the Referee, be clerk of the Drainage Court, and shall be entitled to the same fees as in a county court case, upon production of the certificate of the Referee.

COMPARATIVE TABLE

Shewing the drainage sections of the
Municipal Clauses Act of British
Columbia (6 Edw. VII. Ch. 32
1906) and the corresponding
sections of the Municipal
Drainage Act, Ontario.

BRITISH COLUMBIA ACT.	ONTARIO ACT.
Section 266 (1)	Section 19 (2)
" 266 (2) .....	.....
" 267	" 3 (1)
" 267 (1)	" 19 (1)
" 267 (2)	" 19 (5)
" 267 (3)	" 19 (2)
" 267 (4)	" 19 (3)
" 267 (5)	" 19 (4)
" 268 (1)	" 3 (2)
" 268 (2)	" 81 (1) latter part
" 268 (3)	" 81 (1) first part
" 269	cf. sec. 76
" 270	Section 17 & 18
" 271	" 20 & Sched. B
" 271 (2)	" 21(1) & 33

BRITISH COLUMBIA ACT.	ONTARIO ACT.
Section 272 (1)	Section 6
" 272 (2)	" 7
" 273 (1)	" 32 & 33
" 273 (2)	" 24 ¹ & 25
" 273 (3) & 137	" 41 to 47 inclusive
" 273 (4)	cf. 39
" 273 (5)	Section 52 & 92
" 273 (6) .....	.....
" 274	" 21 (1)
" 275	" 23 & 56
" 276	" 66 (1) & 66 (3)
" 277 .....	.....
" 278	" 55
" 279	" 54
" 280 (1)	" 68
" 280 (2)	" 76
" 280 (3)	" 77
" 281	cf. 59
" 282	Section 83
" 283	cf. 93 (1) & 89 (1)
" 284	Section 95 (1)
" 285	" 79
" 286 .....	.....

REVISED STATUTES OF BRITISH COLUMBIA (1906)

CHAPTER 32.

An Act to Consolidate and Amend the "Municipal
Clauses Act" and Amending Acts.

R. S. 1897, c.
144;
1898, c. 35;
1899, c. 53;
1900, c. 23;
1901, c. 39;
1902, c. 52;
1903-04, c. 42;
1906, c. 31;

[12th March, 1906.]

HIS MAJESTY, by and with the advice and con-
sent of the Legislative Assembly of the Province of
British Columbia, enacts as follows:—

SHORT TITLE.

1. This Act may be cited as the "Municipal Clauses Short Title.
Act." 1896, c. 37, s. 1.

INTERPRETATION.

2. In the construction of this Act the following
expressions shall have the following meanings respec-
tively:—

Interpretation.

"Municipality" shall include any municipal area
now known as a city, town, township, or district,
and heretofore incorporated under any law,
or which hereafter may be incorporated or
established under the "Municipalities Incor-
poration Act," or any special Act of the Legis-
lature:

"Municipality"

"City Municipality" or "City" shall mean and
include any municipal area now known as a city,
and incorporated as a municipal incorporation
under any law, or which may hereafter be in-
corporated as a city under the provisions of
section 3 of the "Municipalities Incorporation
Act," or any special Act of the Legislature

"City Muni-
cipality"

"Township or District Municipality"

"Township or District Municipality" shall mean and include any municipal area now known as a township or district and incorporated as a municipal corporation under any law, or which may hereafter be incorporated as a township or district municipality under the provisions of section 4 of the "Municipalities Incorporation Act," or any special Act of the Legislature :

"The Municipal Council, etc."

"The Municipal Council," "the Council," "Council," shall mean and include the Mayor and Aldermen, or the Reeve and Councillors of a municipality :

"Land."

"Land" shall mean the ground or soil, and everything annexed to it by nature, or that is in or under the soil, except mines and minerals precious or base, belonging to the Crown :

DRAINING AND DYKING.

Power to municipalities to borrow money to carry out certain works of draining, dyking, etc.

206. It shall be lawful for the Municipal Council of any municipality to borrow money upon the credit of the municipality for any or either of the purposes mentioned in the next succeeding section of this Act and in the manner and subject to the conditions in such section prescribed and contained :

Limit of borrowing powers.

(2) Provided that no liability over two and one-half per centum of the total assessed value of the land in the municipality shall be incurred under any local improvement scheme until it has been sanctioned by a vote of the ratepayers, as in the case of an ordinary money by-law. 1896, c. 37, s. 243, & 1897, c. 30, s. 25.

Power to municipalities to pass by-laws for carrying out works of draining, dyking, etc.

267. The Municipal Council of any municipality may, upon receipt of a petition referring and relating to any part or portion of the area of the municipality specified and described in such petition by metes and bounds, established survey lines, or natural boundaries, or both, for the deepening or straightening of any stream creek or water course, or for the draining or dyking of any lands within the municipality (such lands to be described in such petition by metes and bounds, established survey lines, natural boundaries, or both), or for the removal of any obstruction which prevents the free flow of the waters of any stream, creek or water-

course, or for the lowering of the waters of any lake or pond for the purpose of reclaiming flooded lands or more easily draining any lands within such portion of the area as aforesaid, dated as to each signature and signed by a majority in number of the persons shown by the last revised assessment roll of the municipality to be owners of land situate within such portion of the area as aforesaid, and to be the owners of more than one-half in value of the assessed lands within such portion of the area, procure an engineer or practising land surveyor to make an examination of the stream, creek, or water-course proposed to be deepened or straightened, or from which it is proposed to remove obstructions, or of the lake or pond the waters of which it is proposed to lower, or of the locality proposed to be drained or dyked, and may procure plans and estimates to be made of the cost of the proposed work, and an assessment to be made by such engineer or surveyor of the lands to be benefited by such proposed work if carried out, stating as nearly as may be calculated by such engineer or surveyor, the proportion of benefit to be derived therefrom by each section or parcel of land situate and lying within such portion of the area as aforesaid, and may, if it be deemed necessary or expedient to carry out the proposed work or any part or portion thereof, pass by-laws —

- (1) For providing for the carrying out and completion of such proposed work, or any portion thereof, as the case may be : For providing for the work being done.
- (2) For determining what land will be benefited by the carrying out and completion of such proposed work, or portion thereof, as the case may be, and the proportion in which the assessment should be made on the various portions of land so proposed to be benefited and subject in every case of complaint by the owner or any person interested in any land assessed, whether of overcharge or undercharge of any other land assessed, or that land which should be assessed has been wrongfully omitted to be assessed, to proceedings for trial of such complaint and appeal therefrom, in like manner, as nearly as may be, as in the case of an ordinary assessment : Determining what land will be benefited, and with what proportion of assessment charged.

Borrowing

- (3) For borrowing on the credit of the municipality the moneys necessary for the carrying out and completion of the proposed work or portion thereof as the case may be, and for paying all fees, costs charges and expenses lawfully incurred and payable in respect thereof, including the costs of such examination and assessment as aforesaid :

Assessment of special rate on lands benefited

- (4) For assessing, levying and collecting in the same manner as taxes are levied and collected upon the land to be benefited by the deepening, or straightening, or draining, or dyking, or other work or works as aforesaid, a special rate sufficient for the payment of the cost and expense of such deepening, dyking and draining, or sufficient for the payment of the principal and interest of the debentures, and for so assessing and levying the same, as other taxes are levied, by an assesment and rate on the land so proposed to be benefited as nearly as may be to the benefit derived by each lot, or portion of lot, and road in the locality :

Regulating payment of rate.

- (5) For regulating the times and manner in which the assessment shall be paid. 1896, c. 37, s. 244.

Where pumping is necessary.

268. (1) Every Municipal Council shall have like power, and the provisions of the next preceding section shall apply, in cases where the proposed work can be effectually carried out, completed and maintained only by pumping or other mechanical operations ; but in such cases the Council shall not proceed except upon the petition of two-thirds of the owners above mentioned in this section.

Assessment of annual cost of keeping works in operation.

(2) In cases provided for in the preceding provision of this section the Council may pass by-laws for assessing and defraying the annual cost of maintaining the necessary works upon the lands and roads to be benefited thereby, according to the provisions of this Act ; and may do all things necessary, and pass all requisite and proper by-laws, and enter into all proper contracts for maintaining and giving full effect to said works.

(3) In order the better to maintain and operate works constructed under the provisions of this section, the Council may pass by-laws appointing one or more Commissioners from among those whose lands are assessed for the construction of such works, and the Commissioners so appointed shall have full power to enter into all such necessary and proper contracts for the purchase of fuel, repairs of buildings and machinery, and may do all other things necessary to facilitate the successful operation of such works, as may be set forth in the by-law appointing such Commissioners. 1896, c. 37, s. 245.

Appointment
of Commis-
sioners

269. The provisions of section 267 or 268 of this Act shall be deemed to extend to the re-execution or completion of any works which have been executed, or have been partly or insufficiently executed, under any provision of any Act of this Legislature. 1896, c. 37, s. 246.

Application to
works begun
under an Act
of this
Legislature

270. Any person who has signed a petition under section 267 or 268 of this Act shall be at liberty to withdraw therefrom, and to abandon such petition at any time before the expiry of the term limited for appealing from the proposed assessment to the Court of Revision, but not afterwards. If the proposed work shall not be proceeded with on account of such withdrawal from the petition, then the persons signing such petition, including those who have withdrawn therefrom, shall be pro rata chargeable with and liable to the municipality for the expenses incurred by such municipality in connection with such petition, and the amount with which such persons are chargeable shall be entered upon the Collector's Roll for such municipality against the person liable, and shall be collected in the same manner as any other sum so placed on the roll for collection. 1896, c. 37, s. 247.

Abandonment
of petition.

271. Every by-law passed under and in pursuance of the three next preceding sections of this Act, or either of them, shall, mutatis mutandis, be in the form or to the effect following :—

Form of by-law

" A by-law to provide for draining parts of (or for the deepening, or for the dyking of in, or as the case may be) the Township or District of , and for borrowing on the credit of the municipality the sum of for completing the same. Provisionally adopted the day of A.D. 18 :

" Whereas a majority in number and value of the owners, as shown by the last revised assessment roll, of the property hereinafter set forth to be benefited by the drainage (or deepening, or dyking, or as the case may be) have petitioned the Council of the said Township or District of praying that [*here set out the purport of the petition, describing generally the property to be benefited*] :

" And whereas, thereupon the said Council procured an examination to be made by , being a person competent for such purpose, of the said locality proposed to be dyked or drained (or the said stream, creek or water-course proposed to be deepened, or as the case may be), and has also procured plans and estimates of the work to be made by the said , and an assessment to be made by him of the land to be benefited by such drainage (or deepening, or dyking, or as the case may be), stating as nearly as he can the proportion of benefit which, in his opinion, will be derived in consequence of such drainage (or dyking, or deepening, or as the case may be) by every lot, or portion of lot, the said assessment so made being the assessment hereinafter by this by-law enacted to be assessed and levied upon the lots, and parts of lots, hereinafter in that behalf specially set forth and described, and the report of the said in respect thereof, and of the said drainage (or dyking, or deepening, or as the case may be) being as follows : [*Here set out the report of the engineer or surveyor employed*] :

" And whereas the said Council is of opinion that the dyking or drainage of the locality described (or the deepening of such stream, creek or water-course, or as the case may be) is desirable :

" Be it therefore enacted by the said Municipal Council of the said Township or District Municipality of _____, pursuant to the provisions of the 'Municipal Clauses Act' :—

' 1st. That the said report, plans and estimates be adopted, and the said drain (or deepening, or dyking, or as the case may be), and the works connected therewith, be made and constructed in accordance therewith :

" 2nd. That the Reeve of the said Township or District Municipality may borrow on the credit of the Corporation of the said Township or District Municipality the sum of \$ _____, being the funds necessary for the work, and may issue debentures of the Corporation to that amount in sums of not less than one hundred dollars each, and payable within _____ years from the date thereof, with interest at the rate of _____ per centum per annum, that is to say, in [*insert the manner of payment, whether in annual payments or otherwise*] such debentures to be payable at _____, and to have attached to them coupons for the payment of interest :—

" 3rd. That for the purpose of paying the sum of \$ _____, being the amount charged against the said lands so to be benefited as aforesaid, other than lands belonging to the municipality, and to cover interest thereon for _____ years at the rate of _____ per cent. per annum, the following special rates, over and above all other rates, shall be assessed and levied upon the undermentioned lots and parts of lots; and the amount of the said special rates and interest assessed as aforesaid against each lot, or part of lot, respectively, shall be divided into

equal parts, and one such part shall be assessed and levied as aforesaid, in each year, for years after the final passing of this by-law during which the said debentures have to run :

Township or Group	Section of Lot	No. of Acres	Value of Improve- ments	To cover interest— years at per cent	Total Special Assess- ment	Annual Assess- ment during each year for — years
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(2) Every such by-law shall be provisionally adopted by the Council and published for a period of four weeks in the British Columbia Gazette and a weekly newspaper published or circulating in the municipality, such publication to be completed not less than twenty days before the first sitting of the Court of Revision. 1896, c. 37, s. 248, & 1897, c. 30, s. 26.

Assessment need not be confined to the portion of land actually benefited, but may be levied on the whole tract

272. (1) The engineer or surveyor, in assessing the land to be benefited by any works to be executed under section 267, 268, or 269 of this Act, need not confine his assessment to the portion of land actually benefited by such works, but in order that the portion to be rated may be conveniently ascertained, may make such assessment on the whole or any described part of the lands so benefited owned by the person owning the part actually benefited by such works.

Manner in which assessment is to be made

(2) The proportion of benefit to be derived from any works, by different parcels of land or roads, may be shown by the engineer or surveyor by placing on his assessment sums of money opposite the description of such parcels, and it shall not be deemed to have been necessary to state the fraction of the cost to be borne by each parcel. 1896, c. 37, s. 249.

Complaints regarding assessment.

273. (1) Any person complaining of an error or omission in regard to himself as having been wrongfully inserted on or omitted from any assessment prepared under section 267, 268, or 269 of this Act, or as having been undercharged or overcharged in any such assessment, or of having been illegally assessed in respect thereof, may, personally or by means of a complaint in writing signed by him, or by a solicitor, or by any other person authorized by him

in writing to appear on his behalf, bring his complaint and the evidence in support thereof before the Court of Revision of the municipality, which Court the Council shall from time to time as the occasion may require, hold on some day not earlier than twenty nor later than sixty days, unless in the opinion of the Court a further period is necessary for the due hearing and determination of the appeal, from the day on which the publication of the by-law relating to the assessment complained of was completed in accordance with section 271 of this Act, notice of which shall be published with the by-law during the first three weeks of its publication; and all notices of appeal shall be served upon the Clerk of the municipality at least eight days prior to such Court of Revision; but the Court of Revision may, though such notice be not given, permit the appeal to be heard on such conditions as to giving notice to all persons interested and otherwise as may seem just :

(2) Such Court of Revision shall be constituted in the same manner and have the same powers as Courts of Revision constituted under sections 123 to 137, inclusive, of this Act :

Court of Revision.

(3) If the person complaining be dissatisfied with the decision of the Court of Revision, he may appeal therefrom in manner provided for the bringing of such appeals by section 137 of this Act :

Appeal.

(4) In case, on the hearing of such complaint by the Court of Revision, or on any appeal from the decision rendered on such hearing, the assessment is varied in respect of the land which is the subject of the complaint or appeal, the Court of Revision, or the Court appealed to, or a Judge thereof, as the case may be, shall vary pro rata the assessment of the said land, and of the other lands or roads benefited as aforesaid, without further notice to the persons interested therein, so that the aggregate amount assessed shall be the same as if there had been no appeal; and the Registrar or other proper officer of the Court appealed to, or, in case there is no appeal, the Court of Revision shall

Effect of appeal being successful.

return the roll to the Municipal Clerk from whom it was received, and the Assessor or Assessors shall prepare and attest a roll in accordance with their original assessment as altered by such revision :

Alteration of
by-law before
being finally
passed

(5) In the event of any assessment being altered by the Court of Revision, or on appeal therefrom, the by-law relating to such assessment shall, before being finally passed, be amended so as to correspond with such alteration by the Court of Revision or on appeal (as the case may be) :

Where appeal
succeeds before
the by-law is
finally passed

(6) In case the Council shall finally pass the by-law before the time for appealing has expired, or while an appeal is pending, the Court appealed to, or a Judge thereof, shall, notwithstanding such by-law has been passed, proceed and determine the appeal, and if the assessment be varied on such appeal, the Council shall, by an amending by-law, alter the by-law in accordance with the variation so made in the assessment. 1896, c. 37, s. 250.

Publication
of by-laws

274. Before the final passing of any by-law under sections 267, 268, or 269 of this Act, the Council shall cause it to be published once in every week for four weeks in the British Columbia Gazette and in some one or more newspapers selected by resolution of the Council and circulating in the municipality, together with a notice that any one intending to apply to have the by-law, or any part thereof, quashed must, not later than ten days after the final passing thereof, serve a notice in writing upon the Reeve, or acting Reeve and upon the Clerk of the municipality, of his intention to make application for that purpose to the Supreme Court, during the thirty days next ensuing after the final passing of the by-law. 1896, c. 37, s. 251.

Unless quashed
by-law to be
valid despite
of want of
form

275. (1) In case no notice of intention to make application to quash any such by-law is served within the time limited for that purpose in the preceding section, or if the notice is served, then in case the application is not made or is unsuccessful, the by-law shall, notwithstanding any want of substance or form,

either in the by-law itself or in the time and manner of passing the same, be a valid by-law :

(2) Where application is made and is successful in part, so much of the by-law as is not quashed upon the application shall be valid, notwithstanding any want of substance or form aforesaid :

(3) In all cases where any by-law has been or shall be passed by any Municipal Council for any of the purposes mentioned in sections 267, 268, or 269 of this Act, and has not been quashed within the time limited for that purpose, such by-law shall be a good, valid, and subsisting by-law, and the debentures issued thereunder shall be valid and subsisting debentures to all intents and purposes soever, and all assessments to be levied under such by-law shall be recoverable by action, distraint, or any other manner in which taxes or assessments may be recoverable under the provisions of this Act. 1896, c. 37, s. 252.

By-law valid if not quashed within time

276. In case a by-law already passed, or which may be hereafter passed, by the Council of any municipality, for the construction of works under sections 267, 268, or 269, by assessment upon the land to be benefited thereby, and which has been acted upon by the construction of such works in whole or in part, does not provide sufficient means, or provides more than sufficient means, for the completion of the works, or for the redemption of the debentures authorized to be issued thereunder as the same may become payable, the said Council may from time to time amend the by-law, in order fully to carry out the intention thereof, and the petition on which the same was founded, and to assess, levy, and collect the deficiency or refund the surplus (if any) to the assessed owners of the land, pro rata, according to the original assessment. 1896, c. 37, s. 253.

Council may amend by-law

277. In case a by-law already passed or which may hereafter be passed by the Council of any Township or District Municipality under the provisions of sections 267, 268, or 269 of this Act, or under the pro-

Assessment for drainage and dyking works completed in part.

visions of any former Act giving similar authority and power for the construction of works the payment for which has to be met by assessment upon the lands to be benefited thereby, and which has been acted upon by the construction of such works in part, and it shall be deemed inadvisable or impracticable from the nature of the ground or otherwise to complete the said work, the Council may, upon receiving from an engineer or land surveyor appointed to examine the same a report to that effect, cause an assessment to be made by an engineer or land surveyor or other competent person upon the lands benefited by the works so carried out in part, such assessment being based on the amount expended, inclusive of all incidental expenses, on the works so constructed and on the proportionate amount of benefit accruing to each section or parcel of land within the area benefited, and may amend the original by-law and amendments thereto and the petition on which it was founded by readjusting the assessments or otherwise and by providing for the levying and collecting the deficiency, if any, on the basis of such readjusted assessment, and for refunding by payment in cash or by credit on future assessments any taxes imposed and collected under the original by-law (in excess of ordinary taxes) in respect of any lands not benefited by the said works and the excess collected, if any, in respect of any lands which have been benefited in a less degree than was originally contemplated, but subject in every case of complaint by the owner or any person interested in any land assessed, whether of overcharge or undercharge of his own or any other land assessed or that land which should be assessed has been wrongfully omitted to be assessed, to a trial of such complaint and appeal therefrom in like manner as nearly as may be as in the case of an ordinary assessment. 1902, c. 52, s. 58.

Want of form
not to invalid-
ate debentures.

278. No debenture issued, or to be issued, under any by-law aforesaid shall be held invalid on account of the same not being expressed in strict accordance with such by-law; provided that the debentures are for sums not in the aggregate exceeding the amount authorised by the by-law. 1896, c. 37, s. 254.

279. Any person whose land has been assessed for the carrying out of any works under sections 267, 268, or 269 of this Act may pay the amount of such assessment, less the interest, at any time before the debentures of the municipality for the purpose of borrowing the moneys to carry out such work are issued, in which case the number of the debentures issued shall be proportionately reduced. 1896, c. 37, s. 255.

Rebate on
payment
before
rate is due

280. (1) After any work carried out under sections 267, 268, or 269 of this Act is fully made and completed it shall be the duty of the municipality making such work to preserve, maintain, and keep in repair the same, at the expense of the lands and roads, as the case may be, benefited by the carrying out of such work as shown in the by-law provided for the carrying out of such work, when finally passed :

Municipality
to keep works
in repair.

(2) In any case where similar work has been constructed out of the general funds of the municipality, the Council may without petition or the report of an engineer or surveyor, pass a by-law for preserving, maintaining, and keeping in repair the same at the expense of the lands and roads, as the case may be, benefited by such work, and may assess such lands, and roads so benefited, for the expense thereof, in the same manner, by the same proceedings, and subject to the same right of complaint and appeal as is provided with regard to works made and completed under the provisions of this Act, and the Council may, from time to time, change such assessment on the report of an engineer or surveyor, appointed by them to examine and report on such work and repairs, subject to the like rights of complaint and appeal as a person charged would have in the case of an original assessment :

Repairs and
maintenance
may be pro-
vided for by
special rate.

(3) In any of the cases referred to in section 267 of this Act, any moneys that have been or may hereafter be advanced by the Council of any municipality out of its general funds in anticipation of the assessments to be made, or moneys to be borrowed, for the purpose of carrying out any works under the said

Advances out
of general fund
of the municip-
ality for
special works ;
how repayable.

section, shall be recouped to the municipality so soon as the moneys payable under such assessment shall have been collected, or moneys shall have been borrowed as aforesaid. 1896, c. 37, s. 256.

Power to construct drains through adjoining lots or across highway

281. In case any person finds it necessary to continue a drain into an adjoining lot or lots, or across or along any public highway, for the purpose of an outlet thereto, and in case the owner of such adjoining lot or lots, or the Council of the municipality, refuses to continue such drain to an outlet, or to join in the cost of the continuation of such drain, then the firstly mentioned person shall be at liberty to continue his said drain to an outlet, through such adjoining lot or lots, or across or along such highway; and in case of any dispute as to the proportion of cost to be borne by the owner of any adjoining lot or municipality, the same shall be determined by arbitration, as provided in sections 251, 252 and 253 of this Act, and the award so made shall be binding on all parties. 1896, c. 37, s. 257.

Arbitration in case of dispute.

Council may borrow money to carry out repairs

282. Where the repairs, required to be made under section 280, are so expensive that the Municipal Council does not deem it expedient to levy the cost thereof in one year, the said Council may pass a by-law to borrow upon the debentures of the municipality the funds necessary for the work, and shall assess and levy upon the property benefited a special rate sufficient for the payment of the principal and interest of the debentures; such by-law shall not require the assent of the electors. 1896, c. 37, s. 258.

Dispute to be settled by arbitration.

283. If any dispute arises between individuals, or between individuals and a municipality or body corporate, or between a company and a municipality, or between municipalities, as to damages alleged to have been done to the property of any municipality, individual or body corporate, in the construction of reclamation works, or consequent thereon, then the municipality, body corporate, or individual complaining may refer the matter to arbitration, as provided in sections 251, 252 and 253 of this Act, and the award

so made shall be binding on all parties. 1896, c. 37, s. 259.

284. Where on account of proceedings taken under this Act respecting reclamation works and local assessments therefor, damages are recovered against the municipality or parties constructing the reclamation works, or other relief is given by any judgment or order of any Court or any award made under this Act, all such damages or any sum of money that may be required to enable the municipality to comply with any such judgment, order, or award made in respect thereof, shall be charged pro rata upon the lands and roads liable to assessment for such reclamation works: Where damages are recovered against the corporation. Provided always, that if to enable the municipality to comply with any such judgment, order or award, it shall be necessary or expedient to make changes in such works, the same shall for all purposes and in all respects be dealt with and carried out, and all works and operations in respect thereof shall be executed and performed, at the expense of the lots, parts of lots, or roads benefited by the reclamation works. 1896, c. 37, s. 260. Proviso.

285. Any person or persons who shall wilfully and intentionally obstruct, fill up, or injure any ditch, drain, creek, or water-course constructed under the provisions of this Act, or wilfully, or intentionally cut, destroy, or injure, any dyke, or other drainage, or reclamation work connected therewith, shall, upon complaint of the Council of the municipality, be liable to put such drain, ditch, creek, water-course, or dyke in repair, and shall also, upon summary conviction thereof, be liable to a penalty not exceeding two hundred dollars. 1896, c. 37, s. 261. Penalty for injury to works.

286. When any dyke is crossed by a public highway or private road the level of such dyke shall not be interfered with. Wherever the top of a dyke forms a portion of a highway or road it shall be the duty of the Municipal Corporation to maintain the same at a constant level, and to repair all injury directly or indirectly caused to the dyke by its use as a highway or road. 1902, c. 52, s. 59. Level of dykes not to be changed by highways.

COMPARATIVE TABLE

Shewing the sections of the Land
Drainage Act, Manitoba (R.S.
Man. 1902, ch. 50) and the cor-
responding sections of the
Municipal Drainage
Act, Ontario.

MANITOBA ACT.		ONTARIO ACT.
Section 1		
" 2		
" 3		Cf. latter part of sec. 3 (1)
" 4		Cf. section 3 (1), 8 and 15
" 5		Cf. sec. 3 (1)
" 6		
" 7		Cf. sec. 21
" 8		Cf. secs. 3 (1) and 18
" 9		Cf. sec. 3 (1)
" 10		Cf. sec. 10 (2)
" 11		
" 12		
" 13		
" 14		
" 15		

COMPARATIVE TABLE.

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MANITOBA ACT.	ONTARIO ACT.
Section 15 (a)	Cf. sec. 5 Municipal Drainage Aid Act (R.S.O. 1897, Ch. 40).
" 16	Cf. sec. 56, and sec. 7 M.D. Aid Act.
" 17	Cf. sec. 66 (3)
" 18	Cf. sec. 19 (3)
" 19	
" 20	
" 21	Cf. 8 (1) M.D. Aid Act
" 22	(sec. 19 (3)
" 23	
" 24	
" 25	
" 26	
" 27	Cf. sec. 9
" 28	Section 3 (4)
" 29	Cf. sec. 87.
" 30	Section 78 (1)
" 31	" 78 (3)
" 32	" 80
" 33	" 10
" 34	" 9 (1)
" 34 (a).	" 9 (2)
" 34 (b).	" 9 (3)
" 35	" 59
" 36	" 59
" 37	" 74
" 38	" 75

COMPARATIVE TABLE.

MANITOBA ACT.	ONTARIO ACT.
Section 39	Section 9 (4)
" 40	" 68
" 41	" 59
" 42	" 93 and 95 (1)
" 43	" 9 (5)
" 44	" 3 (3)
" 45	
" 46	
" 47	
" 48	
" 49	
" 50	Cf. sec. 39
" 51	" 72 (1)
" 52	
" 53	
" 54	
" 55	Cf. sec. 79
" 56	" 79
" 57	

REVISED STATUTES OF MANITOBA, (1902)

An Act respecting Drainage.

CHAPTER 50

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HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

Short Title

SHORT TITLE.

1. This Act may be cited as "The Land Drainage Act." 58 and 59 V. c. 11, s. 1.

Drainage district.

FORMATION OF DRAINAGE DISTRICTS.

2. Whenever the Lieutenant-Governor in Council deems it of public benefit to drain, reclaim and render fit for occupation and cultivation any lands in the Province, power and authority shall be and are hereby

vested in the Lieutenant-Governor in Council to organize such lands or territory into what may be designated or called a drainage district. 58 and 59 V. c. 11, s. 2.

3. Prior to the formation of any drainage district under the provisions of this Act, a survey and examination shall be made by a competent engineer of the lands sought to be reclaimed, with the view of ascertaining the probable cost thereof, and whether the work, if performed, would be of public benefit. 58 and 59 V. c. 11, s. 3. Preliminary surveys

4. Such engineer shall examine the proposed work and make his report thereon in writing to the Minister of Public Works, upon all and singular the matters aforesaid, accompanied by accurate maps, plans and profiles of the said work. 58 and 59 V. c. 11, s. 4. Report by engineer

5. The report of the engineer aforesaid shall, in addition, contain an accurate description of each parcel of land to be benefited by the proposed work, giving the number of acres in each tract and the estimated number of acres in each tract to be benefited. 58 and 59 V. c. 11, s. 5. Report by engineer.

6. Upon the receipt of the report of the engineer the Minister of Public Works shall report upon the utility and desirability of the said work, and submit the same, together with the report of the said engineer (which shall have annexed thereto all maps, plans, profiles, estimates as to the cost of construction of the proposed work, and all and every other matter or thing affecting the same), to the Lieutenant-Governor in Council, for determination as to whether the said work shall be undertaken. 58 and 59 V. c. 11, s. 6. Report by Minister of Public Works to Lieut.-Gov in Council

7. If the doing of the proposed work meets with the approbation of the Lieutenant-Governor in Council, the Minister of Public Works shall be authorized and empowered to advertise, and shall thereupon publish, a notice that it is the intention of the Department of Public Works to undertake the proposed work (describing it), at an estimated cost (to be stated), as a Notice of intention to undertake work.

local improvement, and to assess and levy against the lands to be benefited thereby (giving a general description thereof) the cost thereof, unless a majority of the owners of the property affected, representing at least one-half in value thereof, petition him, the said Minister of Public Works, against the same within one month after the publication of the said notice. Such notice shall be inserted once in each week for three weeks in *The Manitoba Gazette* and in at least two newspapers, one published in the city of Winnipeg and the other to be determined by the Minister. 58 and 59 V. c. 11, s. 7.

Petition
against under-
taking

8. If a majority of the owners of the real property affected, representing at least one-half in value thereof, petition the Minister of Public Works, within the time hereinbefore limited, against the proposed work, the same shall not be proceeded with. 58 and 59 V. c. 11, s. 8.

Statement by
Minister of
Public Works
respecting
proposed
undertaking

9. After the expiration of one month, if no petition shall have been received against the proposed work, the Minister of Public Works shall cause to be prepared and laid before the Lieutenant Governor in Council a statement showing the following facts, and in the order named, that is to say :—

(a) The estimated cost of the proposed work;

(b) A description of the lands to be benefited by the same, with an estimate of the number of acres benefited in each parcel, as shown by the engineer's report;

(c) The estimated amount of benefits to each of the said tracts of land;

(d) The amount that each of the said tracts of land, so to be benefited, will be liable for and must pay for the location and construction of the said work, which shall be determined by the Minister of Public Works as follows :—The total cost shall be divided by the total estimated benefits for the rate of cost on each one dollar of benefit (the engineer shall not be obliged to carry out and use a smaller fraction

than one-tenth of one mill); the amount of estimated benefits on each tract of land shall be multiplied by the same rate and the result set down in a column opposite each of said tracts or parcels of land; and such result so obtained shall be the amount that each of said tracts or parcels of land shall be liable to pay for the proposed work, exclusive of the debenture interest hereinafter mentioned;

(e) Whereupon the Lieutenant Governor in Council shall constitute the lands to be benefited by the proposed work into a drainage district, to be designated as "Drainage District No. (*giving a number*)."
58 and 59 V. c. 11, s. 9, *part*.

Formation of
drainage
district.

DEBENTURES.

10. Upon the formation of such drainage district, the Lieutenant Governor in Council shall, before or at any time after the execution of the work, order the issue and negotiation of debentures of such district for the estimated or actual cost of such work, and shall fix the time which said debentures shall run, which shall not be less than twenty nor more than thirty-five years. 58 and 59 V. c. 11, s. 9, *part*; 61 V. c. 16, s. 1.

Issue of
debentures.

11. Such debentures shall be in such denominations as the Lieutenant Governor in Council may determine, and shall bear interest, payable annually or semi-annually, at a rate not exceeding six per cent. per annum, and shall be prepared with the coupons for interest to be attached thereto, in such form as will meet the requirements of the provisions of this Act, and may either be in currency of the Dominion of Canada or sterling money of Great Britain, and be made payable at any place in Canada or the United Kingdom. 58 and 59 V. c. 11, s. 10.

Debentures.

12. Such debentures shall be signed by the Provincial Treasurer and sealed with the seal of the Province; and the coupons for interest shall also be signed with the signature of the Provincial Treasurer, lithographed or printed thereon. 58 and 59 V. c. 11, s. 11.

Execution of
debentures.

Operation of
debentures.

13. Such debentures shall specify that they are issued in accordance with the provisions, and pursuant to the authority of this Act, naming it by its title, and stating the number of the district on account of which the same are issued, and that the security for the repayment of the respective amounts thereof, and the coupons attached thereto, is and shall be a perpetual lien upon the lands subjected to assessments for benefits under this Act comprised within the drainage district, and on account of which such debentures are issued, so long as the same, or any part thereof, shall remain unpaid; and it is hereby declared that such debentures, with the coupons attached thereto, shall constitute such a perpetual lien upon the lands, for the period and in the manner aforesaid :

Provided, however, that such debentures and coupons for interest shall not be considered or construed to constitute a lien on any tract or parcel of land within the drainage district to any greater amount than the amount of the benefits assessed against such parcel or tract, pursuant to the provisions of this Act. 58 and 59 V. c. 11, s. 12.

Drainage
district
debentures
account.

14. Upon a disposition and realization of the amount of the debentures herein provided for (which shall be sold to the best possible advantage), the Provincial Treasurer shall open a special account in the books of his office to be called "Debenture Account of Drainage District No. *(giving the number)*," to which shall be credited the total amount received from the sale of the debentures aforesaid. 58 and 59 V. c. 11, s. 13, *part*.

Guarantee of
drainage
debentures by
Province.

15. The Treasurer of the Province may, for and on behalf of the Province, notwithstanding the provisions of the thirteenth section of this Act, upon the approval of the Lieutenant Governor in Council, guarantee the principal and interest of any debentures issued under the authority of this Act, in which case the provisions of such debentures, limiting the security, shall be omitted and the amount of all special assessments against the lands in the drainage district, for the drainage and reclaiming of which such debentures shall

be issued, shall be a first lien, in the manner hereinbefore provided, to the said Provincial Treasurer, or

(a) The Treasurer of the Province may, with the approval of the Lieutenant Governor in Council, invest from time to time in such drainage debentures any surplus of the Consolidated Revenue of the Province or any trust funds (other than such as may be held for Court or official administration purposes, or other like and specific trusts), not exceeding in the whole the sum of two hundred thousand dollars. 58 and 59 V. c. 11, s. 24, *part*.

Investment of
Provincial or
trust funds in
drainage
debentures

16. Any debentures issued under the authority of this Act shall not be questioned, and shall be deemed valid to all intents and purposes whatsoever. 58 and 59 V. c. 11, s. 25.

Validation of
debentures

17. Any surplus that may be remaining in the hands of the Provincial Treasurer, after the full and complete payment of any drainage debentures issued under the authority of this Act, shall be refunded by the said Treasurer to the treasurer of the municipality in which said drainage district is, and shall be ratably distributed to the credit of the lands remaining unsold appearing in the statement hereinbefore provided; and the sums so distributed shall constitute a credit to the extent of the apportionment on general taxes against such land at the time outstanding or to mature. 58 and 59 V. c. 11, s. 28.

Application
of surplus

18. The Minister of Public Works shall, upon undertaking the performance of any work under the provisions of this Act, prepare or cause to be prepared duplicate and triplicate copies of the statement mentioned in the ninth section of this Act, adding thereto columns showing the total proportionate amounts necessary to be levied and collected annually from the parcels or tracts therein mentioned in order to pay the interest upon the debentures as the same shall become due and payable, and to provide a sinking fund for the redemption of the said debentures at maturity, basing such calculation upon the extent of the benefits to each parcel or tract to be benefited by the proposed work as set forth in the ninth section of this Act, one of

Levy for
payments
made

which copies shall be forwarded to the treasurer of each municipality (in case there may be more than one) in which the work or a portion thereof is, and the other shall be filed in the land titles office or registry office for the district in which such lands, or any portion thereof lie.

Lieut.-Gov. in Council may provide that sinking fund shall not be levied during first five years after issue of debentures.

(a) The Lieutenant-Governor in Council may if deemed advisable, vary the provisions of this section by providing that the sinking fund necessary for the redemption of the debentures at maturity shall not be levied or collected during the first five years next after the date of issue of the debentures, in which case the statement provided to be prepared shall be varied accordingly, but the whole sinking fund shall be levied and collected during the remainder of the period during which such debentures run. 58 and 59 V. c. 11, s. 15; 61 V. c. 16, s. 2.

Entry of levy in collector's roll.

19. The amount necessary to be collected for the purpose of paying the interest for the first year on the debentures issued, and to provide the annual sinking fund as set forth in the statement aforesaid, shall be entered by the treasurer of the municipality in which any of said lands lie upon the tax collector's roll for the current year, and it shall be the duty of such treasurer to notify the owner of each parcel or tract of land of the amount which each owner of such parcel or tract is liable to pay. 58 and 59 V. c. 11, s. 16.

Levy to be entered annually.

20. Thereafter annually, until the debentures issued shall have been fully paid and satisfied, the treasurer of the municipality in which said lands lie shall enter against the said parcels or tracts of land the amount which said parcels or tracts of land are required to pay, as shown by the statement aforesaid. 58 and 59 V. c. 11, s. 17.

Amounts collected to be remitted to Provincial Treasurer.

21. The treasurer of a municipality, having the collection of any assessments made under the authority of this Act shall, from time to time, remit the same to the Provincial Treasurer, who shall credit the same

to the aforesaid accounts (designating the number of the drainage district on account of which such payments shall be made), distinguishing between interest and sinking fund :

Provided, however, that all amounts received shall be credited to interest account until there shall be sufficient to the credit of such account to pay the current year's interest on the outstanding debentures. It shall, however, be discretionary with the Provincial Treasurer to temporarily transfer to the credit of the interest account any sum that shall be to the credit of the sinking fund account, in order to pay promptly any interest maturing or past due on said debentures. 58 and 59 V. c. 11, s. 19.

22. The amounts entered by the treasurer of a ^{Effect of levy} municipality upon the tax collector's roll of the municipality, against any parcel or tract of land under the provisions of the two last preceding sections, shall have the same force and effect as other taxes levied in the municipality and be collectable in the same manner as if levied under the provisions of "The Assessment Act" :

Provided, however, that there shall be no discount for prompt payment of the special tax represented by the amounts appearing in the collector's roll of a municipality, as aforesaid, but such special tax shall, nevertheless, be liable and subject to the penalties provided in "The Assessment Act" in the case of non-payment of taxes within the time therein limited for the payment thereof. 58 and 59 V. c. 11, s. 18 ; 62 and 63 V. c. 12, s. 1.

23. Any municipality in which drainage work has ^{Assessment of benefited lands not to be raised until debentures paid.} been undertaken or completed under the authority of this Act, or of any Act or Acts for which this Act is substituted, shall not assess any parcel or tract of land shown in the statement hereinbefore referred to, for any greater sum than that for which said parcel or tract of land was assessed prior to the undertaking of said work (which, for the purposes of this Act, shall be deemed to be the date of the first publication of the notice required by the seventh section of this Act or

the corresponding provision of such former Act until the debentures issued for the performance of the same shall have been fully paid and satisfied. 58 and 59 V. c. 11, s. 20 ; 62 and 63 V. c. 12, s. 2.

Last two
sections
retroactive.

24. The provisions of the two last preceding sections of this Act shall be retroactive in their operation and effect, and shall apply to all works heretofore constructed and performed, as well as to those now in course of construction under the provisions of chapter eleven of the Acts passed in the fifty-eighth and fifty-ninth years of the reign of Her late Majesty Queen Victoria and any and all amendments thereof and to be completed hereunder, to all intents and purposes as if the said provisions had, in the first instance, been embodied in said chapter eleven. 62 and 63 V. c. 12, s. 4.

PUBLIC WORKS ACT TO APPLY.

Application of
Manitoba
Public Works
Act.

25. The work shall be proceeded with and completed in the same manner as other public works of the Province are undertaken and performed, and for the purpose aforesaid it is hereby declared that all the provisions of "The Manitoba Public Works Act" shall be applicable to all intents and purposes as if the said work was being performed thereunder. 58 and 59 V. c. 11, s. 13, *part*.

ALTERATION OF PLANS.

Minister of
Public Works
may vary
preliminary
plans etc

26. For the purpose of doing and performing any work under the provisions of this Act, the Minister of Public Works may, for the better carrying out thereof, vary or alter the preliminary plans, drawings and profiles of the said work, either at the inception of the work or at any time during the prosecution of the same, and such variation or alteration in the manner of performance of the said work shall in no wise violate, annul or render abortive the formation and extent of the drainage district or have the effect of absolving and freeing the lands therein from the payment of the special drainage tax theretofore provided to be paid by such lands :

Provided, however, that any variation or alteration of plans under the provisions of this section shall not have the effect of increasing the total cost of the work as originally estimated. The provisions of this section shall be retroactive in their operation and effect. 63 and 64 V. c. 10, s. 2.

Section
retroactive.

POWER OF ENTRY.

27. The Minister of Public Works, or any person or persons duly authorized by him, shall have full power and lawful authority, in the execution of any works under the provisions of this Act, to enter into and upon all lands necessary for the proper performance and execution of the said works, and, for the purpose of draining the area described in any drainage district and rendering the same fit and suitable for occupation and cultivation, to make and construct all and every kind of drains, water courses, ditches, culverts, dams, dykes, slides, roads, bridges and other works necessary therefor or incident thereto. 61 V. c. 16, s. 3.

Power of
entry.

ASSESSMENT.

28. The lands and roads lying outside the drainage district and belonging to any municipality, company or individual using any drainage work as an outlet, or for which when the work is constructed an improved outlet is thereby provided, either directly or through the medium of any other drainage work, may, under the powers contained herein, be charged for the construction of the drainage work so used as an outlet or for providing an improved outlet, to the extent of the benefit accruing to such municipality, company or individual, as may be determined by the Minister of Public Works. 61 V. c. 16, s. 4, s-s. 7.

Assessment of
lands using
drainage
Works as an
outlet.

29. Unaccrued assessments and levies under this Act, or under any former Act having the same title as this Act, shall not be deemed to be or to have ever been an incumbrance as between vendor and purchaser. 59 V. c. 15, s. 11 ; 1 Ed. 7, c. 23, s. 9, *part*.

Unaccrued
levies not an
incumbrance
as between
vendor and
purchaser.

OBSTRUCTIONS.

Removal of
obstructions.

30. When any drainage work, heretofore or hereafter constructed, becomes obstructed by dams, bridges, fences, washouts or other obstructions caused by the owner or the person in possession of the lands where such obstruction occurs, so that the free flow of water is impeded thereby, the person or persons owning or occupying such land shall, upon reasonable notice in writing given by the council or the clerk of the municipality, remove such obstructions in any manner caused as aforesaid, and if not so removed within the time specified in the notice, the council or the clerk shall forthwith cause the same to be removed. 61 V. c. 16, s. 9, s-s. 1.

Cost thereof.

31. If the cost of removing such obstruction is not paid by such owner or occupant to the municipality forthwith after the completion of the work, the council may pay the same and the clerk of the municipality shall place or cause to be placed such amount upon the collector's roll against the said lands, with ten per cent. added thereto, and the same shall be collected like other taxes. 61 V. c. 16, s. 9, s-s. 2.

Allowance for
obstructions
removed.

32. Whenever in the course of any drainage work any dam or artificial obstruction exists in the course of or below the work, the Minister of Public Works may, upon the payment of such amount as may be agreed upon or in his opinion adequate, remove the same either in whole or in part; and any amount so paid shall be deemed as part of the cost of construction of the original work. 61 V. c. 16, s. 12.

Clearing road
allowance.

33. When it is necessary to construct any drainage work on or along a road allowance, the Minister of Public Works may cause to be close-chopped, or grubbed and cleared, not less than twelve feet of the middle of the road allowance (if required), and spread thereon the earth taken from the work, and shall charge the cost of so doing as part of the cost of the drainage work. 61 V. c. 16, s. 10.

CONSTRUCTION OF BRIDGES, ROADS, ETC.

34. The Minister of Public Works may also authorize the construction, enlargement or other improvement of any bridges or culverts throughout the course of any such drainage work, rendered necessary by such work crossing any public highway or the travelled portion thereof.

Construction,
etc., of bridges
and culverts.

(a) The Minister of Public Works may also authorize the construction or enlargement of bridges required to afford access from the lands of owners to the travelled portion of any public road or highway.

(b) The Minister of Public Works may also provide for the construction or enlargement of bridges rendered necessary for the drainage work upon the lands of any owner, and may fix the value of the construction or enlargement thereof to be paid to the respective owners entitled thereto. 61 V. c. 16, s. 14 ; s-ss. 1-3.

EXTENSION OF WORKS.

35. In the performance of any drainage work under the provisions of this Act, the Minister of Public Works shall have the power, if necessity requires it, of continuing the work outside of a drainage district for the purpose of carrying off the water by a proper channel or outlet, and such work shall be considered to be part of the cost of such drainage work. 58 and 59 V. c. 11, s. 29.

Continuing
work beyond
drainage
district.

36. Whenever it is required to continue any drainage work beyond the limits of any drainage district, the Minister of Public Works may continue the same on or along or across any road allowance, and from any such road allowance into or through any municipality, until a sufficient outlet is reached. 61 V. c. 16, s. 11.

Extension of
work beyond
drainage
district.

37. The council of any municipality or municipalities, whose duty it is to maintain any drainage work for which only lands within the jurisdiction of such municipality or municipalities are assessed, may,

Extension by
municipality
of drainage
work after
completion

after the completion of the drainage work, upon a *pro rata* assessment on the particular lands within the drainage district benefited, as last assessed for the construction of the drainage work, deepen, widen or extend the same, provided the cost of such deepening, widening or extending does not in any one year exceed the sum of five hundred dollars, and in every case where the cost would exceed that sum the proceedings to be taken shall be as hereinafter provided. 61 V. c. 16, s. 5.

Extension by
Minister of
Public Works
of drainage
work after
completion.

38. Whenever for the better maintenance of any drainage work constructed under the provisions of this Act, or any former Act respecting drainage, or to prevent damage to any lands or roads, it shall be deemed expedient to change the course of such drainage work, or to make a new outlet for the whole or any portion of the work, or otherwise improve, extend or alter the work, the Minister of Public Works may, upon the petition of the municipality, or the joint petition of the municipalities, whose duty it is to maintain and keep the said drainage work in repair, and without any other preliminary requirements, other than a report of an engineer appointed by him to examine and report upon the same, undertake and complete the change of course, new outlet, improvement, extension or alteration of such drainage work; and, for the purposes aforesaid, the Minister of Public Works shall have the all powers to assess and charge the lands in his opinion benefited in the same manner, to the same extent and by the same proceedings as provided for in this Act. 61. V. c. 16, s. 6.

INCORPORATION OF OTHER WORKS.

Incorporation
of other
works

39. The Minister may incorporate, in whole or in part, into the general drainage work being done or continued in any district under the provisions of this Act, any other drainage work done in the district since its organization as such, or that is being done by any person, company or corporation, and in such event he may allow to such person, company or corporation the value of such other work to the extent that in his opinion it shall contribute to the value of the general

work, and payment of the value so fixed shall be made as if the same were received under the provisions thereof. 61 V. c. 16, s. 4, s-s. 4.

MAINTENANCE OF WORKS.

40. Where a drainage work does not extend beyond the limits of one municipality, such drainage work shall be maintained and kept in repair by such municipality in the manner provided for in this Act. 61 V. c. 16, s. 8.

Maintenance of drainage work wholly within one municipality.

41. Any drainage work constructed under the provisions of this Act, or any Act or Acts for which this Act is substituted, which is continued through more than one municipality, or which is commenced in one municipality and continued thence into any other municipality or municipalities, shall, after the completion thereof, be maintained by the former municipality from the point of commencement thereof to a point at which the drainage work crosses the boundary line into another municipality and by every other municipality in like manner through or into which the drainage work is continued, at the expense of the lands in any way assessed for the construction thereof and in the proportion determined by the Minister of Public Works in his report and assessment for the original construction of the work; and for the purpose of collecting the cost of such maintenance each and every municipality interested shall have all the powers and authority for the levying and collection thereof against the lands liable therefor, as aforesaid, as provided for the levying and collection of ordinary municipal rates by "The Assessment Act" and amendments thereto. 61 V. c. 16, s. 7.

Maintenance of inter-municipal drainage works.

DAMAGES.

42. The Minister of Public Works shall have the power to consider and award the payment of any damages that may be occasioned by the performance of any work under the provisions of this Act, and any damages so paid shall be considered as part and parcel of the cost of such work. 58 and 59 V. c. 11, s. 30.

Damages occasioned by execution of works.

Allowance for damage occasioned by disposition of material taken from work.

43. The Minister of Public Works shall determine in what manner the material taken from any drainage work shall be disposed of, and the amount to be paid to the respective persons entitled to damages to lands and crops (if any) occasioned thereby. 61 V. c. 16, s. 4, s-s. 5.

RELIEF DRAINAGE WORKS.

Construction of relief drainage work.

44. If from the doing of any drainage work, water is caused to flow upon and injure lands or roads outside the drainage district, the construction of all drainage work required for relieving the lands or roads injuriously affected may be undertaken by the Minister of Public Works as part of the general work. 61 V. c. 16, s. 4, s-s. 6.

PAYMENTS.

Payments for work.

45. All payments with respect to any work performed under the provisions of this Act shall be made by voucher signed by the Minister of Public Works addressed to the Provincial Treasurer, which shall be sufficient authority for the latter to pay the amount thereof, and to charge the same against the special drainage account aforesaid. 58 and 59 V. c. 11, s. 14.

SALE OF LANDS FOR ARREARS OF TAXES.

Sale for arrears of drainage tax.

46. The treasurer of a municipality shall not allow or permit more than two years of the special drainage tax imposed under the provisions of this Act to remain outstanding, without selling the lands liable for such arrears; and, notwithstanding any provision of "The Assessment Act," it shall be the duty of the municipal treasurer to sell the same without other warrant or authority, on receiving the warrant of the Provincial Treasurer therefor. 58 and 59 V. c. 11, s. 22.

Sale for taxes of benefited lands.

47. In the event of a sale for arrears of taxes of any land liable for the payment of the special drainage tax herein provided for, a sufficient amount of the proceeds of such sale shall be first credited by the treasurer of such municipality to the special drainage tax in arrears, notwithstanding that there may be other arrears for which the said land was sold. 58 and 59 V. c. 11, s. 21.

48. The Treasurer of the Province may become the purchaser at any tax sale of any land in a drainage district constituted under the provisions of this Act, or any former Act respecting drainage. 58 and 59 V. c. 11, s. 26.

Provincial Treasurer empowered to purchase land sold for non-payment of drainage tax.

49. The proceeds derived from the sale of any land acquired by the Provincial Treasurer under the provisions of the last preceding section shall be devoted to the payment of any amount in arrear for interest or sinking fund upon the debentures issued for and on account of the drainage district of which such land forms a portion. 58 and 59 V. c. 11, s. 27.

Application of moneys derived from sale of such lands.

LANDS NOT LIABLE FOR DRAINAGE TAXES.

50. All lands within any drainage district established under the provisions of this Act, or any former Act respecting drainage, in so far as this Legislature shall have power to impose the same, shall be liable for any special tax levied thereunder. If, however, from any cause, it transpires that any such land cannot legally be subjected to the special tax, the amount thereof shall be deducted, and rateably distributed between the lands liable, and collected in the annual levies from the lands so liable, upon the principle of apportionment hereinbefore provided. 58 and 59 V. c. 11, s. 23.

Case of land that cannot be taxed.

51. In case it appears that any land in a drainage district is not liable for taxation at the time of the performance of the aforesaid work, but afterwards during the currency of the debentures it becomes liable to taxation, the municipality may assess such lands for an amount to be approved by the Minister. 58 and 59 V. c. 11, s. 20, s-s. 2.

Assessment of land not taxable when work performed.

MISCELLANEOUS PROVISIONS.

52. Payments made by the Minister of Public Works under any of the provisions of the twenty-eighth, thirty-fourth, thirty-ninth, forty-third and forty-fourth sections of this Act shall be deemed to be expenditure on account of the drainage district within or on account of which such work is performed. 61 V. c. 16, s. 4, s-s. 8.

Certain payments to be charged to district.

Act to apply
to works
already or
now being
constructed

53. The provisions of this Act, so far as applicable shall extend and apply to all works heretofore constructed or now being constructed in any drainage district formed under any previous Act respecting drainage. 61 V. c. 16, s. 15, *part*.

Supplementary
orders in
council

54. The Lieutenant-Governor in Council may supplement any of the provisions of this Act with such other provisions, not inconsistent with this Act, as may be deemed necessary to provide for the convenient operation of this Act. 58 and 59 V. c. 11, s. 31.

PENALTIES.

Penalty for
removing
posts, etc., on
drainage
works.

55. Any person who shall remove, deface, cut down, destroy, or in any way interfere with, any posts, signs or other indications on or upon any drainage works, placed thereupon by the engineer in charge of the works, or by any other person by his direction, for the purpose of denoting lines or levels, or for other purposes in connection with the said works, shall, upon the complaint of the engineer in charge of the works or other person aforesaid, be liable, upon summary conviction before a justice of the peace, to a fine of not less than five dollars nor more than one hundred dollars, and costs of prosecution, or to imprisonment for any term not exceeding six months, or, in default of payment of such fine and costs, to imprisonment for any term not exceeding six months. 62 and 63 V. c. 12, s. 3.

Penalty for
injury to
drains or
watercourses.

56. Any person who shall wilfully obstruct, fill or dam up, cut, injure or destroy, or in any manner impair the usefulness of, any Provincial, municipal or other public drain, ditch or watercourse, constructed for the purpose of drainage or for protection against overflow, or who shall wilfully destroy or injure an embankment of any such drain, ditch or watercourse, or any drainage work connected therewith, shall, upon summary conviction before a justice of the peace, be liable to a fine of not less than five dollars nor more than fifty dollars and costs, and in default of payment to imprisonment for not less than one week nor more than two months. 1 and 2 Ed. 7, c. 29, s. 17.

57. For the purpose of complying with the provisions of the nineteenth, twentieth and twenty-first sections of this Act, the treasurer of the municipality or municipalities (as the case may be) shall be the officer of the Minister of Public Works, and, as such, shall be bound to comply with his directions; and in case of any default he may, by order of the Lieutenant-Governor in Council, be dismissed from office, and in addition, upon the complaint of the Minister of Public Works or the Provincial Treasurer, he shall be liable to a fine, upon summary conviction before a justice of the peace, of not more than one hundred dollars and costs of prosecution, or to imprisonment for any term not exceeding six months, or, in default of payment of such fine and costs, to imprisonment for any term not exceeding six months. 61 V. c. 16, s. 14.

Treasurer of municipality subject to dismissal and prosecution for disobeying certain provisions of Act.



PART TWO.
THE DITCHES AND
WATERCOURSES ACT

R. S. O. 1897, Chapter 285, and
Amendments thereto.

Table of Statutes showing the various enactments respecting Ditches and Watercourses from time to time in force in Ontario.

- 1859—Con. Statutes Upper Canada, Ch. 57.
- 1869—32 Vic., Ch. 46.
- 1874—38 Vic. Ch. 26 "An Act respecting Ditching Watercourses,"
—Repealed the two earlier Acts.
- 1877—40 Vic. Ch. 8, secs. 59 and 60 amended the Act of 1874.
- 1877—F S. O. 1877, Ch. 199, "The Ditches and Watercourses Act."
- 1878—Vic. Ch. 12 amended R.S.O. 1877 Ch. 199.
- 1880—43 Vic. Ch. 30 amended R.S.O. 1877, Ch. 199.
- 1883—46 Vic. Ch. 27, "The Ditches & Watercourses Act 1883."
Repealed R.S.O. 1877, Ch. 199 and amending Acts.
- 1884—47 Vic. Ch. 43 amended The Ditches and Watercourses Act 1883.
- 1885—48 Vic. Ch. 47 amended The Ditches and Watercourses Act 1883.
- 1886—49 Vic. Ch. 44 amended The Ditches and Watercourses Act 1883.
- 1887—50 Vic. Ch. 37 amended The Ditches and Watercourses Act 1883.
- 1887—R. S. O. Ch. 220, "The Ditches and Watercourses Act."
- 1888—51 Vic. Ch. 35 amended R.S.O. 1887, Ch. 220.
- 1889—52 Vic. Ch. 49 amended R.S.O. 1887, Ch. 220.
- 1890—53 Vic. Ch. 67 and Ch. 68 amended R.S.O. 1887, Ch. 220.
- 1894—57 Vic. Ch. 55, "The Ditches and Watercourses Act 1894,"
repealed R.S.O. 1887 and amending Acts.
- 1895—58 Vic. Ch. 54 amended The Ditches and Watercourses Act 1894.
- 1896—Vic. Ch. 67 amended The Ditches and Watercourses Act 1894.
- 1897—R. S. O. 1897 Ch. 285, "The Ditches and Watercourses Act."
- 1899—62 Vic. (2) Ch. 28 amended R.S.O. 1897 Ch. 285.
- 1901—1 Edw. VII. Ch. 12, sec. 22, amended R.S.O. 1897 Ch. 285.
- 1902—2 Edw. VII. Ch. 12, sec. 26, amended R.S.O. 1897 Ch. 285.
- 1904—4 Edw. VII. Ch. 10, secs. 62 and 63 amended R.S.O. 1897 Ch. 285.
- 1907—7 Edw. VII. Ch. 48 amended R.S.O. 1897 Ch. 285.
- 1908—8 Edw. VII. Ch. 64 amended R.S.O. 1897 Ch. 285.

THE DITCHES AND WATERCOURSES ACT.

R. S. O. 1897, Chapter 285 and Amendments thereto.

SHORT TITLE, s. 1.	APPEALS, ss. 22, 25, 26.
APPLICATION OF ACT, s. 2.	DEFECTS IN AWARDS, s. 24.
INTERPRETATION, s. 3.	COLLECTION OF COSTS FROM OWNERS, s. 27.
APPOINTMENT OF ENGINEER, s. 4.	COMPLETION OF WORK ON OWNERS' DEFAULT, ss. 28-31.
LIMIT OF WORK AND COST, s. 5.	OWNERS USING DITCH AFTER CONSTRUCTION, s. 32.
LANDS SUBJECT TO ACT, s. 6.	ACT TO APPLY TO DEEPENING AND WIDENING DITCHES, s. 33.
MODE OF PROCEEDING, s. 7.	MAINTENANCE OF DITCHES HERETOFORE OR HEREAFTER CONSTRUCTED, s. 34, 35.
Declaration of ownership, s. 7.	RECONSIDERATION OF AWARD, s. 36.
Notice to owners affected, s. 8.	PENALTY, ENGINEER FAILING TO INSPECT, s. 37.
Where agreement by owners, ss. 9-12.	MANDAMUS PROCEEDINGS NOT TO LIE, s. 38.
Where no agreement, appointment of engineer and examination by him, ss. 13-17.	FORMS, s. 39.
Award by engineer, s. 18.	
Powers of engineer, s. 19.	
WHERE LANDS OR ROADS ARE IN ADJOINING MUNICIPALITIES, s. 20.	
CULVERTS, ETC., ON RAILWAY LANDS, s. 21.	

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title.

1. This Act may be cited as "*The Ditches and Watercourses Act.*" R.S.O. 1897, c. 285, s. 1.

Certain Acts not affected.

2. This Act shall not affect the Acts relating to municipal or government drainage work. R.S.O. 1897, c. 285, s. 2.

SCOPE AND OBJECT OF THE ACT.—The Ditches and Watercourses Act is intended to be made use of in, and to afford the necessary authority for, the construction of comparatively short and inexpensive drains, which will carry the surplus water to sufficient outlets so that no injury to neighbouring lands will result from their operation. (Sec. 5: *re McLellan & Tp. of Chinguacousy* (1900) 27 A.R. 355, at p. 362; *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, at p. 453; *Chapman v. McEwan* (1905) 6 O.W.R. 104, at p. 166; *Wicke v. Tp. of Ellice* (1906) 11 O.L.R. 422, at p.

125.) It does not authorize the construction of drains which will affect large areas of land, nor such as will involve the expenditure of large sums of money, and as a result necessitate the levying of a special tax on the lands to be drained and the issuing of municipal debentures to defray the cost.

PROCEDURE UNDER THE MUNICIPAL DRAINAGE ACT CONTRASTED WITH THAT UNDER THE DITCHES AND WATERCOURSES ACT.—The powers conferred by The Municipal Drainage Act are intended to be availed of in the construction or repair of drainage works which by reason of the extent of the area to be drained and the number of landowners to be affected become of quasi-public or municipal character. By the provisions of that Act, therefore, the carrying out of the proposed work is entrusted to the municipality within which the lands of the petitioners are situate. Proceedings are initiated by a petition directed to the council of the municipality, which may exercise full discretion in determining whether the necessity for, and practicability of, the proposed scheme deserve investigation. Should the council decide to have an examination made of the lands desiring drainage, an engineer is entrusted with the duty of laying out the work and apportioning the estimated cost amongst the landowners whose lands will derive benefit from its construction. The result of the engineer's inspection and calculations is embodied in his report. This is presented to the council, which is thereupon authorized to determine whether the work shall be done or not, and should it decide to proceed, to pass a by-law sanctioning the scheme and making the necessary provisions for its completion and for payment. The municipality supervises the construction of the drain and is liable in the first instance for the cost of the work and also for such damages and compensation as may be awarded parties who are injured thereby. The amount required to complete the drain is assessed against the lands to be benefited by its operation, in such proportions as are determined by the engineer in his report or on appeal therefrom, and the municipality is authorized to levy and collect such assessments in the same manner as municipal taxes are levied and collected.

The provisions of the Ditches and Watercourses Act, on the other hand, are adapted to assist in the construction of such drains as are projected primarily for the relief of the owner who initiates the proceedings, and such as are, therefore, local and semi-private in character, but which are obliged to enter the lands of one or more neighboring proprietors in order to obtain a sufficient fall or outlet for the water collected. The owner of the land requiring drainage is accordingly authorized to set the Act in motion on his own initiative, by serving notice on the neighboring landowners whose lands will be entered or benefited by the construction of the ditch. If an agreement is arrived at the Act makes it of binding effect and provides a remedy for enforcing its terms against any parties who may subsequently make default in performing their obligations under it. The ditch may then be dug by the parties interested, each completing his own portion of the work, without any interference by, or assistance from, the municipality, except in cases where the municipality is a party to the agreement when it is bound by it in exactly the same way as any private owner. It is only in cases where no agreement is arrived at that the engineer is called in to determine the rights of the parties and supervise the doing of the work. While the engineer is appointed by the council he does not act as their representative, but on behalf of the owners affected.

He makes no report to the council, nor have they any authority to determine whether the work shall be proceeded with or not. *Re McLellan & Tp. of Chinguacousy* (1900) 27 A. R. 355 at p. 362; *Seymour v. Tp. of Maidstone* (1887) 24 A. R. 370, at p. 374.) As a consequence the municipality is not liable for any claim for compensation or damages arising from the carrying out of the award, except where the award proves to be invalid and the municipality has itself contributed directly to the injury complained of. (*McCrimmon v. Tp. of Yarmouth* (1900) 27 A. R. 636.) The assessments under the Ditches and Watercourses Act are, in the first instance, in labor and material, and it is only in the event of an owner making default and failing to complete the share allotted to him within the time limited, that the Act authorizes the letting of the unfinished portion by contract, and the cost being charged against the land of the owner in default. The rights and liabilities of the owners who are parties to the award are to be worked out under the provisions of the Act. Such an owner may have specific performance of the relief sought, but has no right of action for damages against another party to the award who by his neglect has occasioned the injury complained of. (*Murray v. Dawson* (1867) 17 U. C. C. P. 588 at p. 592; *Dalton v. Tp. of Ashfield* (1899) 26 A. R. 363 at p. 381; *re McLellan & Tp. of Chinguacousy* (1900) 27 A. R. 355 at p. 363.)

Rev. Stat., c.
285, applica-
tion lands for
mining or
manufacturing
purposes.

2a. The said Act shall apply to the drainage amongst other lands of lands for mining or manufacturing purposes so as to enable the owner thereof to take proceedings thereunder, but in such case the engineer in default of agreement shall determine whether the lands of other owners through which the ditch or drain may pass shall be called upon to contribute to the construction of the drain and whether and to what extent the same may require drainage or will be benefited thereby. In the event of his finding that the lands of such other owners do not require drainage and that the said ditch or drain will not substantially benefit the same he shall determine what compensation the owner of the lands used for mining or manufacturing purposes shall make for any injury caused to such other owners by reason of the drain or ditch passing through their lands, but if such lands will be substantially benefited by such drainage then he shall determine the extent of such benefit and shall deduct the same from the amount of compensation so to be made, or shall take the proceedings provided for by subsection (2) of section 16 of the said Act as the case may require.

(2) Nothing in this section contained shall affect any litigation pending at the time of passing thereof. 62 V. (2), c. 28, s. 2.

3. Where the words following occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—

"Engineer" shall mean Civil Engineer, Ontario Land Surveyor, or such person as any municipality may deem competent and appoint to carry out the provisions of this Act.

"Engineer"

Under the provisions of The Municipal Drainage Act, the proposed drainage work must be located and planned by an engineer or an Ontario Land Surveyor, that is to say by a professional man presumably qualified to undertake work of this nature. The office of "engineer" under The Ditches and Watercourses Act, however, may be filled by any person whom the municipality considers competent to perform the duties entrusted to him by the Act. (*McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446 at p. 452.)

"Judge" shall mean the senior, junior or acting Judge of the County Court of the county in which the lands are situated in respect of which the proceedings under this Act are taken.

"An owner" shall mean and include the owner or possessor of any real or substantial interest in lands whether held in fee simple, fee tail, for one or more life or lives or for a term of years not less than ten, a lessee for a term of not less than five years with an option to purchase, the executor or executors of an owner, the guardian of an infant owner, any persons entitled to sell and convey the land, an agent under a general power of attorney authorizing the appointee to manage and lease the lands, and a municipal corporation as regards any highways or other lands under its jurisdiction."

"Owner"

The meaning of the term "owner" was not defined in any of the Acts in force prior to the enactment of The Ditches and Watercourses Act, 1894. *Tp. of Osgoode v. York* (1894) 21 A.R. 168, 24 S.C.R. 282, was decided upon the law as it stood prior to that date. In this case it was held by the Supreme Court, affirming the judgment of the Court of Appeal, that a person who possessed a real and substantial interest in the land to be drained was an "owner" within the meaning of the Act, and that a person who was assessed as owner was not entitled to set the Act in motion unless he did in fact possess such an interest. No amendment has been made to the Act since the rendering of this decision which would qualify or overrule the general principle established by it, that the assessment roll is not conclusive evidence of the status

of parties to an award and that the actual qualification of any reputed "owner" may be inquired into by the Court. But where a declaration of ownership has been filed the question of ownership must now be raised in the manner provided for by sec. 7a. The judgment of the Court of Appeal in the recent case of *Tp. of Warwick v. Tp. of Brooke* (1901) (1 O.L.R. 433) in which that Court came to the opposite conclusion in determining the meaning of "owner" as applied to a petitioner under The Municipal Drainage Act proceeded altogether upon the wording of section 3 (1) of that Act. By that section qualified petitioners are expressly defined as persons shown "by the last revised assessment roll to be owners." The absence of any such clause from the definition given by the Ditches and Watercourses Act makes it clearly distinguishable.

In *Tp. of McKillop v. Tp. of Logan*, (1899) (29 S.C.R. 702) the point in dispute was whether a lessee of land who had an option to purchase which he had not exercised was qualified to file a declaration of ownership and initiate proceedings under the Act. The definition of "owner" as it stood in the Act of 1894, upon which this decision was based, included "any person entitled to sell and convey the land." It was held by the Supreme Court that the possessor of such an option did not come within this definition.

In 1899 the definition of "owner" was recast by the Legislature (62 Vic. (2) Ch. 28 sec. 1) into the shape in which it now stands. Amongst other changes, the definition was broadened to include (1) the possessor of any substantial interest in lands for a term of not less than ten years, and (2) a lessee for a term of not less than five years with an option to purchase. To this extent therefore, the decision in *Tp. of McKillop v. Tp. of Logan* has been overcome, and is no longer an authority upon this point. At the same time the Legislature prescribed the forum for determining questions of ownership, in all cases where a declaration of ownership has been filed, by adding section 7a to the Act. This section provides that the filing of a declaration of ownership shall be conclusive evidence that the party who filed it was vested with jurisdiction to proceed under the Act unless the question of ownership is raised by appeal to the County Court Judge. If the required declaration has been filed, any contention that the party who set the Act in motion did not possess a sufficient interest in the land to be drained to come within the definition of an "owner" given by the Act must now be raised in the way specified or not at all. If no declaration of ownership has been filed, it would seem to follow that the proceedings would be open to attack upon this ground, as hitherto, at any stage of the undertaking and before any competent authority.

"OWNER" MEANS THE OWNER FOR THE TIME BEING.—In the recent case of *Wicke v. Tp. of Ellice*, (1906) (11 O.L.R. 422 at p. 426) Meredith C.J., in delivering the judgment of a Divisional Court, said in this connection: "It appears to us that the Legislature must have used the term 'owner' as meaning the owner for the time being. It would be an extraordinary thing if, after the proceedings had been begun under the Act and when the arbitration was proceeding, an owner who had been notified of the proceedings and was a party to them could, by the conveyance of his lands to some other person, defeat entirely the purposes for which the proceedings had been instituted and make it necessary to begin de novo."

THE TERM "OWNER" INCLUDES A MUNICIPAL CORPORATION.—This appears clearly from the definition given. In *re McLellan v. Tp. of Chinguacousy* (1900) (27 A. R. 355 at p. 361) Lister J. A. said: "What the Act does is to confer on a municipal council the same rights and impose the same liabilities as are conferred and imposed on an individual owner."

RAILWAY COMPANIES.—Every railway company owning or operating a railway in the Province of Ontario, and subject to the legislative authority of the Legislature of Ontario, is to be considered an owner of lands under the provisions of The Ditches and Watercourses Act (R. S. O. 1897 Ch. 286, secs. 2 and 3.) The procedure to be adopted in constructing, enlarging or extending a ditch across the lands or right of way of a railway company is set out in "The Railway, Ditches and Watercourses Act" (R.S.O. 1897 Ch. 286) which is to be read as part of The Ditches and Watercourses Act.

But the lands of a railway company operating under a charter of the Dominion of Canada are not subject to the jurisdiction conferred upon the engineer by the Act. (*Miller v. Grand Trunk Ry.* (1880) 45 U.C.Q.B. 222; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A. R. 636 at p. 638.) In the case of such railways as fall within this class, the legislative jurisdiction of the Province is limited to enacting that the railway shall clean out and keep in repair any drain forming part of its authorized works, wherever its failure to do so has occasioned injury to the lands of adjoining proprietors. (*Canadian Pacific Ry. Co. v. Corp. Notre Dame de Bonsecours* (1899) A.C. 367.) But see now the provisions of the Railway Act, R. S. C. 1906, c. 37, secs. 250, 251, at p. 313 below.

"Clear days" shall mean exclusive of the first and "Clear days." last days of any number of days prescribed.

"Ditch" shall mean and include a drain open or "Ditch," covered wholly or in part and whether in the channel of a natural stream, creek or watercourse or not, and also the work and material necessary for bridges, culverts, catch-basins and guards.

"Ditch."

The definition given here may be compared with the much more comprehensive meaning attached to the phrase "drainage work" by section 3 (1) of The Municipal Drainage Act.

"Watercourse."

See cases cited under this heading, section 3 (1) of The Municipal Drainage Act above.

"Non-resident" shall mean a person who does not "Non-resi-
reside within the municipality in which his lands, dent." affected by proceedings under this Act, are situate.

"Non-resident."

Cf. The Assessment Act 1904 (4 Edw. VII. Ch. 23) section 33 (5) to 33 (10) inclusive.

It has been said by Osler J. A. in *Tp. of Warwick v. Tp. of Brooke* (1901) (1 O.L.R. 433 at p. 443.) that non-resident owners who have not caused their names to be entered on the assessment roll are not qualified to initiate a drainage work under The Municipal Drainage Act. There would appear, however, to be nothing in The Ditches and Watercourses Act to prevent a non-resident owner taking the necessary steps to put the Act in motion.

"Maintenance."

"Maintenance" shall mean and include the preservation of a ditch and keeping it in repair.

"Maintenance."

This definition is in substance identical with that given in The Municipal Drainage Act.

As to what constitutes a work of maintenance see cases cited under section 73 of The Municipal Drainage Act.

The definition given in the Act is noted without comment by Moss J.A. in *Dalton v. Tp. of Ashfield* (1899) (26 A.R. 363 at p. 380.)

"Construction"

"Construction" shall mean the original opening or making of a ditch by artificial means.

"Construction"

Cf. Definition contained in sec. 2 (1) of The Municipal Drainage Act.

"Written,"
"writing."

"Written," "writing," or terms of like import shall include words printed, engraved, lithographed or otherwise traced or copied. R.S.O. 1897, c. 285, s. 3; 62 V. (2), c. 28, s. 1.

"Written"

Cf. definition contained in section 8 (14) of The Interpretation Act.

Appointment
of engineer.

4. (1) Every municipal council shall name and appoint by by-law (Form A) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken.

"Shallappointone person to be the engineer."

As will be seen by reference to the definition of the word "engineer" given in section 3 of the Act, the person appointed need not be either a civil engineer or an Ontario Land Surveyor. The council may appoint any person to the office whom they deem competent to carry out the provisions of the Act.

The duty of the council to appoint an engineer is obligatory and may be enforced against them should they neglect to fill the office after being requested to do so by any interested party. (*Dagenais v. Town of Trenton* (1893) 24 O.R. 343, at pp. 345, 348.) The engineer must be appointed by by-law, and his appointment will not be regular or vest jurisdiction in him unless the appointment of his predecessor in the office, if any, has been revoked by by-law as provided by this section. (*Turle v. Tp. of Euphemia* (1900) 31 O.R. 404.) The Act differs in this respect from The Municipal Drainage Act which contains no express provision that the engineer shall be appointed by by-law. (See notes to section 3(1) of that Act.)

The following is the form of draft by-law given in the Schedule to the Act.

FORM A.

(Section 4.)

BY-LAW FOR APPOINTMENT OF ENGINEER.

A by-law for the appointment of an engineer under *The Ditches and Watercourses Act*.

Finally passed, 190 .

The municipal council of the of
in the county of enacts as follows :

1. Pursuant to the provisions of section 4 of *The Ditches and Watercourses Act*, of (name of person) of the town (or township), of in the county of is hereby appointed as the engineer for this municipality to carry out the provisions of the said Act.

2. The said engineer shall be paid the following fees for services rendered under the said Act (or as the case may be).

3. This by-law shall take effect from and after the final passing thereof.

Reeve.

Clerk.

[L.S.]

R.S.O. 1897, c. 285, Sched. Form A.

THE OFFICE OF ENGINEER DESCRIBED.—In *Seymour v. Tp. of Maidstone*, (1897) (24 A.R. 370, at p. 374) Osler J.A. expressed the following opinion as to the relationships existing between the engineer appointed under the Act and the municipality which appointed him. "The engineer is an independent officer, appointed, no doubt, by the council, but appointed in fulfilment of a statutory duty cast upon them, not to carry out the instructions of the council but those of the persons who require the drain to be made. His duties are fixed and prescribed by the statute. The council exercise no judgment, give him no instructions, and have no control over his proceedings. Though he files his award with the township

clerk he makes no report of his action to the council, and unless they happen to be affected by the award as landowners they are no parties to the award and have no right of appeal therefrom."

"*Shall be and continue an officer*"

In *Turtle v. Tp. of Euphemia* (1900) 31 O.R. 404, it appeared that the defendant council had appointed R. their engineer by by-law. Subsequently, without notice to him and without revoking his appointment by by-law, they passed a by-law purporting to appoint S. to the office. Meredith J. held that the provisions of this section were imperative, and as they had not been complied with that S. had no authority to exercise the powers conferred upon an engineer by the Act, and as a result, that the award made by him was invalid. In this case Meredith J. raises, but does not decide the question whether the notice required by this section to be given the engineer is notice of the intention of council to revoke or of having revoked his appointment.

Fees of clerk
and engineer.

(2) The council of every municipality shall, by by-law, provide for the payment to the clerk of the municipality of a fair and reasonable remuneration for services performed by him in carrying out the provisions of this Act, and the council shall also by by-law, fix the charges to be made by the engineer of the municipality for services performed by him under this Act.

The following sub-sections of section 320 of The Consolidated Municipal Act 1903 (3 Edw. VII. Ch. 19) bear upon the remuneration to be allowed the clerk.

"320(a). It shall be the duty of the council to give to the clerk of the municipality for services and duties performed by him in carrying out the provisions of The Ditches and Watercourses Act, a fair and reasonable remuneration, to be fixed by by-law of the council.

(b). The council shall fix by by-law the sum to be paid to the clerk by any person for copies of awards or other documents, or for any other services rendered by the clerk, other than services which it is his duty to perform under the provisions of The Ditches and Watercourses Act."

Oath of
engineer.

(3) Every engineer appointed by a municipal council under this section shall, before entering upon his duties take and subscribe the following oath (or affirmation) and shall file the same with the clerk of the municipality:—

In the matter of *The Ditches and Watercourses Act*.

I (name in full) of the town of _____, in the county of _____, engineer (or surveyor) make oath and say, (or do solemnly declare and affirm), that I will to the best

of my skill, knowledge, judgment and ability, honestly and faithfully and without fear of, favour to, or prejudice against, any owner of owners perform the duties from time to time assigned to me in connection with any work under *The Ditches and Watercourses Act*, and make a true and just award thereon.

Sworn (or solemnly declared and affirmed) }
 before me at the of
 in the county of this
 day of A.D. }

A Commissioner, etc., (or Township Clerk, or J. P.)

R.S.O. 1897, c. 285, s. 4.

"Shall take the following oath"

It has been held by the Court of Appeal in a case which arose under *The Municipal Drainage Act* (*Tp. of N. Colchester v. Tp. of N. Gosfield* (1900) 27 A.R. 281, at p. 285) that where the engineer neglects to take the prescribed oath before entering upon his duties, his report is made without jurisdiction and may be set aside. See also *re Burnett & Town of Durham* (1899) 31 O.R. 262. Both these cases are more fully considered under section 5 of *The Municipal Drainage Act*, above. The principle upon which these decisions are based would appear to make them equally applicable to a case where an engineer has failed to take the oath prescribed by this section. In the recent case of *re McCrae & Village of Brussels* (1904) (8 O.L.R. 156, at p. 161) objection was taken that the members of the court of revision had not been sworn as required by statute. Moss C.J.O., in delivering the judgment of the Court of Appeal, expressed the opinion that it did "not necessarily follow that neglect or failure to take the oath rendered their acts void." No reference was made to the cases cited above, and the opinion expressed was not necessary to a determination of the case. If the oath taken was substantially the same as that prescribed the objection will not be sustained. (*Re Smith & Tp. of Plympton* (1886) 12 O.R. 20, at p. 37.)

5. (1) Every ditch to be constructed under this Act shall be continued to a sufficient outlet, but shall not pass through or into more than seven original township lots exclusive of any part thereof on or across any road allowance, unless the council of any municipality upon the petition of a majority of the owners of all the lands to be affected by the ditch passes a resolution authorizing the extension thereof through or into any other lots within such municipality, and upon the passing of such resolution the proposed ditch may be extended in pursuance of such resolution, but subject always to the provision of subsection 2 of this section.

(2) No ditch, the whole cost whereof according to the estimate of the engineer or the agreement of

Limit of
work.

Limit of cost.

the parties will exceed \$1,000, shall be constructed under the provisions of this Act. R.S.O. 1897, c. 285, s. 5.

"A sufficient outlet."

The Act does not define the term "sufficient outlet." In the absence of a definition of its own, that given by The Municipal Drainage Act, "the safe discharge of water at a point where it will do no injury to lands or roads" may be adopted. To bring the ditch within the protection of the Act it is essential that its waters shall be discharged into a sufficient outlet. In delivering the judgment of the Court of Appeal in the recent case of *McGillivray v. Tp. of Lochiel* (1904) (8 O.L.R. 446) Garrow J.A. said in this connection (p. 452) : "The statute requires the water to be taken to a sufficient outlet, so that no person's lands shall be flooded or overflowed. The duty to provide such an outlet is the same whether the engineer is called in or not. He has no power to determine what is, or what is not a proper outlet, not even as against a resisting party to his proceedings, who could certainly before the work proceeds bring that question into Court for adjudication, notwithstanding the award. The question of proper outlet is really in the nature of a condition precedent to the authority of the engineer in the premises. If it does not exist the proposed drain cannot be made, and he has no jurisdiction, and an injunction, might be obtained to restrain all proceedings under the award." And in *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636, at p. 644, Osler J.A. said : "The award under the Ditches and Watercourses Act appears to have been without jurisdiction, on the ground that providing as it does for carrying the waters through the grounds of the Canada Southern Railway Company, who were not subject to the Act, no outlet was provided for them, and the whole scheme was incomplete and defective."

The above citations are abundantly supported by the cases determined upon the same point under the provisions of The Municipal Drainage Act, and similar drainage enactments. (*Northwood v. Tp. of Raleigh* (1882) 3 O.R. 347 at p. 358 : *Tp. of Ellice v. Hiles* (1894) 23 S.C.R. 429 at p. 445 : *re Tp. of Raleigh & Tp. of Harwich* (1899) 26 A.R. 313 at p. 318 : *Chapel v. Smith* (1890) 80 Mich. 100 : *Bruggink v. Thomas* (1900) 125 Mich. 9, *French v. White* (1855) 24 Conn. 170.)

SUFFICIENT OUTLET A QUESTION OF FACT.—On the other hand in *Chapman v. McEwan* (1905) 6 O.W.R. 164, at pp. 166, 167, Britton J. expressed his dissent from the opinion of Garrow J.A. cited above, and said that the question whether a ditch emptied into a sufficient outlet or not was a question of fact to be determined by the engineer under the powers vested in him by section 16 (2) of the Act, or on appeal from him by the County Court Judge, and in this case as both had held the outlet sufficient, he declined to interfere with their findings.

Whether the proposed point of discharge will be a sufficient outlet is in each case a question of fact to be determined in connection with all surrounding circumstances. Thus in *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446 at p. 450, Garrow J.A. said, in delivering the judgment of the Court of Appeal : "Of course a running stream with sufficient banks to contain the water would usually be a sufficient outlet. But the question is one of fact

For instance a stream already fully occupied in carrying the water properly belonging to it would not be a proper outlet for foreign water brought to it by a ditch constructed under the Act, if the inevitable result would be to cause the water to overflow upon the lands of the owners down stream." A set of facts illustrative of the above citation were present in the case of *Young v. Tucker* (1899) 26 A.R. 162; 30 S.C.R. 185. It appeared in this case that the water brought down by the defendant's drain found its way to a swale or marsh, the banks of which were insufficient to contain the additional body of water. As a result it overflowed and damaged the plaintiff's land. The Court of Appeal held that the defendant was liable. See also upon this point *Hart v. Scott* (1907) 168 Ind. 530.

"Unless the council . . . upon the petition of a majority of the owners of all the lands to be affected."

It has been said by Osler J.A. (*Seymour v. Tp. of Maidston* (1897) 24 A.R. 370 at p. 374) that if a ditch initiated under this Act should pass through more than the specified number of lots, then unless a majority of the owners of the lands to be affected sign the required petition and procure a resolution of the council sanctioning the extension, the engineer is without jurisdiction and his award is invalid. This decision is in agreement with *Yerk v. Tp. of Osgoode* (1894) 24 S.C.R. 282 at p. 286, and also with a number of cases determined upon a construction of the corresponding provision of section 3 (1) of The Municipal Drainage Act. See cases collected under section 21 (1) of that Act above.

HOW REQUIRED MAJORITY IS TO BE ASCERTAINED.—It will be noted that the wording of the section is "a majority of the owners of all the lands to be affected by the ditch." It may be questioned whether in cases where the engineer has caused other owners to be served, under section 16 (1), in addition to those served by the owner requiring the ditch, under section 14, a clear majority of all the owners including those added by the engineer is not necessary to vest jurisdiction in him. Such a decision would be in agreement with the decision of the Court of Appeal in *re Robertson & Tp. of N. Easthope* (1899) 16 A.R. 214, 217, and the numerous other cases decided upon the more ambiguous wording of section 3 (1) of the Municipal Drainage Act. (See cases cited under sec. 3 (1) M.D.A. and *McKenna v. Tp. of Osgoode* (1906) 13 O.L.R. 471 at p. 476.) The recent alteration by the Legislature in the wording of The Municipal Drainage Act, terminating the authority of these cases upon this point, so far as that Act is concerned, would not, it seems, render the reasoning on which they proceed less applicable to the wording of this section, which is clearer in import and has undergone no such alteration.

6. (1) The lands, the owners of which may be made liable for the construction of a ditch under this Act, shall be those lying within a distance of one hundred and fifty rods from the sides and point of commencement of the ditch, but the lands through or into which the ditch does not pass and which lands also adjoin any road allowance traversed by the ditch shall not be liable except when directly benefited and then only for the direct benefit. 8 Edw. VII. c. 64. s. 1.

What lands to be liable for construction.

LANDS LIABLE FOR CONSTRUCTION.—The proper construction of this section would appear to be that all lands through or into which the ditch passes or which lie within the specified distance of it, may be assessed for their fair proportions of the work and material necessary to complete it, and if so charged will be conclusively presumed to be benefited to the extent of the shares assigned them, except in so far as the engineer's award may be varied on appeal as provided by section 22; but that lands through or into which the ditch does not pass, and which adjoin a road allowance traversed by the ditch shall not be liable except when directly benefited, the question of benefit to be determined upon the facts in each such case.

BENEFIT.—In considering whether a parcel of land will receive any benefit from the construction of the proposed ditch it is proper to consider what, if any, enhanced financial value will accrue to it as a result of the digging of the ditch, either through the increased productive power of the land or by rendering it more saleable and at a better price. (*Re Hodgson & Tp. of Bosanquet* (1886) 11 O.R. 589, at p. 591; *Tp. of Gosfield S. v. Tp. of Gosfield N.* (1897) 1 C. & S. 342 at p. 344.) The amount of benefit will necessarily vary, as between different lands, according to their differences of elevation, the quantity of water to be drained from each, the distance of the undrained water from the course of the proposed ditch, the presence or absence of existing drains and other like factors. (*Suiterland-Innes v. Tp. of Romney* (1900) 30 S.C.R. 495 at p. 520.)

The duty of determining whether or not any particular parcel of land will be benefited by the proposed ditch is committed by the Act to the engineer, and on appeal from him to the judge of the County Court, and findings of either reasonably exercised will not be set aside by the Court in the absence of clear proof of mistake, fraud or bias. (*Re Roberts & Holland* (1871) 5 P.R. 346 at p. 353; *York Tp. of Osgoode* (1893) 24 O.R. 12 at p. 26; *re Tp. of Rochester v. Tp. of Mersca* (1899) 26 A.R. at p. 481; *Alstad v. Sim* (1906) 109 N.W.R. 66; *Fraser v. Mulany* (1906) 129 Wisc. 377; and see further cases upon this point collected under section 21 (1) of The Municipal Drainage Act above.)

But if the proposed ditch can be of no possible benefit to the contesting owner, as in a case where his land is already supplied with ample drainage facilities, or is of no commercial or agricultural value, the Act does not authorize his being called upon to contribute to its construction, and he may by appealing from the award obtain relief from such obligation. (*Riddell v. McKay* (1877) 13 C.L.J. 92, *Dartnell J.J.C.C.*; *Healy v. McDonald* (1890) 26 C.L.J. 600, *Dartnell, J.J.C.C.*; and see also the cases cited under section 21 (1) of The Municipal Drainage Act above.)

(A further discussion of the meaning of the word "benefit" when used to define the advantages resulting from the construction of a drain or ditch, and citations from the decided cases, will be found under section 3(1) of The Municipal Drainage Act above.)

Declaration of
ownership.

7. (1) Any owner other than the municipality shall, before commencing proceedings under this Act, file with the clerk of the municipality in which the parcel of land requiring the ditch is situate, a declaration of ownership thereof (Form B) which

may be taken before a Justice of the Peace, a commissioner for taking affidavits, or the clerk of the municipality.

(2) In case of omission to file such declaration through inadvertence or mistake at the time aforesaid, the Judge may in case of such ownership at said time permit the same to be filed at any stage of the proceedings upon such terms and conditions as he may impose or direct. R.S.O. 1897, c. 285, s. 7.

7a. Where a declaration of ownership has been filed under the provisions of *The Ditches and Water-courses Act*, such declaration shall be conclusive as conferring jurisdiction to proceed unless appealed against to the county judge under the provisions of the said Act, but this amendment shall not affect any pending litigation nor shall it be regarded as implying that the proper construction of the said statute was or is otherwise than as herein in this section declared. 62 V. (2), c. 28, s. 7.

Declaration of ownership conclusive as to conferring jurisdiction.

WHO MAY INITIATE PROCEEDINGS.—The right to set the Act in motion is confined to such persons as come within the definition of the term "owner" supplied by the Act. In *Tp. of McKillop v. Tp. of Logan* (1899) 29 S.C.R. 702, the Supreme Court was called upon to determine whether the filing of a declaration of ownership was sufficient to confer jurisdiction upon the engineer, when it appeared that the party who had filed it did not in fact possess a sufficient interest in the lands which it was proposed to drain to bring him within the definition of the term "owner" as it then stood. They held, reversing the Court of Appeal (25 A.R. 498) that it was not. Strong C.J. in his judgment, at p. 704, said: "What was intended was that no person other than one having the interest required by the Act should be able to put the proceedings in force." And Gwynne J., at p. 716: "There can, I think, be no doubt that the Act is peremptory that no one but an owner of land is competent to initiate proceedings under the Act, and that no award made in proceedings instituted by a person who was not an owner of land is of any validity whatever."

In 1899, however, the Legislature, by the enactment of section 7a expressly declared that the proper construction of this section was that the filing of a declaration of ownership was conclusive evidence of jurisdiction, unless the declaration filed was set aside on appeal to the county court judge in the manner provided by the Act. It follows, therefore, that as the Act now stands, if a declaration of ownership has been filed, the validity of the proceedings is not open to attack in an action on the ground that the party who initiated the proceedings was not qualified to do so. But if no declaration of ownership has been filed, a party affected by the ditch would appear to be still able to open up the question of ownership in a subsequent action.

(Further comment on *Tp. of McKillop v. Tp. of Logan* (1899) 29 S.C.R. 702, will be found in the notes appended to section 3 supra.)

REQUIREMENT OF FILING HELD TO BE DIRECTORY ONLY.—The converse of the set of facts under consideration in *Tp. of McKillop v. Tp. of Logan* came before a Divisional Court for determination in *Maisonnette v. Tp. of Roxborough* (1899) 30 O.R. 127. In this case it appeared that the party who had set the Act in motion was an owner, within the definition given by the Act, but that he had failed to file a declaration of ownership as required by this section. The plaintiff had taken part in the proceedings before the engineer, and made no objection to their regularity. The Court held that under these circumstances she should not be permitted to urge this objection to the jurisdiction of the engineer in the action which she had brought for damages for an alleged unlawful seizure of her goods due to her failure to perform the work allotted her by the engineer. Meredith C.J. in speaking for the Court (p. 131) said: "When such a provision is found in an Act dealing with proceedings which in most cases are taken without the aid of a solicitor and in the rural districts, and recourse to which will probably be of frequent occurrence in almost every part of the Province, it seems to me that it ought to be treated as directory only; the essence of the thing is, to my mind, the fact of ownership, the filing of the declaration of ownership merely the form in which that fact is to be evidenced for the purpose of the proceedings; this manner of viewing the proceedings finds support, I think, from the anxious care which is manifested throughout the Act to prevent what is done under it being defeated by defects in matter of form and even in matters of substance; secs. 10, 23, 24."

So long as anything remains to be done to carry the award into effect, the County Court Judge has power, under sub-section 2, to permit a declaration of ownership being filed, provided that the party who omitted to file it in the first instance was at that time qualified to do so.

The form of declaration of ownership provided by the Act is as follows:

FORM B.

(Section 7)

DECLARATION OF OWNERSHIP.

In the matter of *The Ditches and Watercourses Act*, and of a ditch in the township (or as the case may be) of . . . in the county of

I, , of the of , in the county of , do solemnly declare and affirm that I am the owner within the meaning of *The Ditches and Watercourses Act*, of lot (or the sub-division of the lot, naming it) number , in the concession of the township of , being (describe the nature of ownership).

Solemnly declared and affirmed }
before me at the
of , in the county }
of , A.D. 190 .

a Commissioner.
(J. P. or Clerk.)

R.S.O. 1897, c. 285, Sched. Form B.

8. The owner of any parcel of land who requires the construction of a ditch thereon shall, before filing with the clerk of the municipality the requisition provided for by section 13 of this Act, serve upon the owners or occupants of the other lands to be affected a notice in writing (Form C) signed by him and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work, and supply of material for construction among the several owners according to their respective interests therein, and settle the proportions in which the ditch shall be maintained, and the notices shall be served not less than twelve clear days before the time named therein for meeting. R.S.O. 1897, c. 285, s. 8.

Notice to
other owners
affected. . .

"The construction."

The procedure prescribed by this and following sections applies also to all cases where it is proposed to deepen, widen or cover a ditch previously constructed under the provisions of the Act. (Sec. 33.)

"Shall, before filing . . . the requisition"

It has been held by Dartnell, county court judge (*Furness v. Gilchrist* (1889) 25 C.L.J. 64) that an attempt and failure to reach an agreement at the friendly meeting provided for by this section were conditions precedent to calling in the engineer to make an award. In *Maisonnette v. Tp. of Roxborough* (1899) 30 O.R. 127, at p. 131, however, a Divisional Court decided, under the circumstances present in that case, that failure to hold such a meeting had not invalidated the engineer's award, on the ground that the plaintiff had estopped herself from taking advantage of the omission.

"Serve"

Section 15 defines the mode of serving notices.

The following is the form given in the appendix :

FORM C.
(Section 8)

NOTICE TO OWNERS OF LANDS AFFECTED BY PROPOSED DITCH.

To

Township of , (date) 190

Sir,

I am within the meaning of *The Ditches and Watercourses Act*, the owner of lot (or the sub-division, as in the declaration) number in the concession of , and as such owner I require a ditch to be constructed (or if for reconsideration of agreement or award to deepen, widen or otherwise improve the ditch, state the object) for the draining of my said land under the said Act. The

following other lands will be affected : (*here set out the other parcels of land, lot, concession, and township and the name of the owner in each case ; also each road and the municipality controlling it.*)

I hereby request that you, as owner of the said (*state his land.*) will attend at (*state place of meeting*), on the day of , 189 , at the hour of o'clock in the noon, with the object of agreeing, if possible, on the respective portions of the work and materials to be done and furnished by the several owners interested and the several portions of the ditch to be maintained by them.

Yours, etc.,
(*Name of owner*)

R.S.O. 1897, c. 285, Sched. Form C.

"Clear days."

See Section 3.

Form of
agreement—
filing.

9. (1) If an agreement is arrived at by the owners, as in the next preceding section is provided, it shall be reduced to writing (Form D) and signed by all the owners, and shall within six days after the signing thereof be filed with the clerk of the municipality in which the parcel of land the owner of which requires the ditch is situate; but if the lands affected lie in two or more municipalities the agreement shall be in as many numbers as there are municipalities and filed as aforesaid with their respective clerks; and the agreement may be enforced in the like manner as an award of the engineer as hereinafter provided.

(2) It shall be the duty of the municipality to keep printed copies of all the forms required by this Act. R.S.O. 1897, c. 285, s. 9.

The agreement is to be in the following form.

FORM D.

(Section 9)

AGREEMENT BY OWNERS.

Township of , (date) 190

Whereas it is found necessary that a ditch should be constructed (*or deepened, or widened, or otherwise improved*) under the provisions of *The Ditches and Watercourses Act*, for the draining of the following lands (and roads if any) : (*here describe each parcel and give name of owner as in the notice, including the applicant's own land, lot, concession and Township, and also roads and by whom controlled.*)

Therefore we the owners within the meaning of the said Act of the said lands (*and if roads proceed* and the reeve of the said municipality on behalf of the council thereof) do agree each with the other as follows : That a ditch be constructed

as the case may be) and we do hereby estimate the cost thereof at the sum of \$, and the ditch shall be of the following description : (here give point of commencement, course and termination, its depth, bottom and top width and other particulars as agreed upon, also any bridges, culverts or catch-basins, etc., required.) I, owner of (describe his lands) agree to (here give portion of work to be done, or material to be supplied) and to complete the performance thereof on or before the day of A.D. 190 . I, , owner, of etc. (as above, to the end of the ditch.)

That the ditch when constructed shall be maintained as follows: I, owner of (describe his lands) agree to maintain the portion of ditch from (fix the point of commencement) to (fix the point of termination of his portion), I, owner of (describe his lands) agree to maintain, etc., (as above, to the end of the ditch).

Signed in presence of { (Signed by the parties here.)

R.S.O. 1897, c. 285, Sched. Form D.

"Shall .. be filed."

This provision would probably be construed to be directory only. Failure to file the agreement, or to file it within the specified time would not invalidate the agreement. (Section 10 : *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226 at pp. 238, 241 ; *Maisonnette v. Tp. of Roxborough* (1899) 30 O.R. 127 ; *Driver v. Moore* 98 S.W.R. 734.)

"Signed by all the owners."

Including the municipality where its lands or roads will be affected by the proposed ditch. By section 12 the reeve is authorized to sign on behalf of the municipality. The assent of the municipality should be evidenced by a resolution of the council instructing the reeve to sign the agreement. (*Per Osler J. A. in York v. Tp. of Osgoode* (1894) 21 A.R. 168 at p. 174.)

10. No proceedings taken or agreement made and entered into under the provisions of sections 8 and 9 of this Act shall in any case for want of strict compliance with such provisions be void or invalidate any subsequent proceedings under this Act, provided the notices required by section 8 of this Act have been duly served, and any such agreement may with the consent in writing of the parties thereto (which consent shall be filed in the same manner as the agreement), or by order of any Court, or of the Judge on an appeal under this Act, be amended so as to cause the same to conform to the provisions of this Act. R.S.O. 1897, c. 285, s. 10.

Informalities
not to invali-
date proceed-
ings.

Adjourning
meeting for
purpose of
adding
parties

11. If at or before the meeting of owners provided for in section 9 of this Act, it appears that any notice required by section 8 has not been served, or has not been served in time, or duly served, the owners present at such meeting may adjourn the same to some subsequent day in order to allow the necessary notices to be duly served, and such adjourned meeting shall, if such notices have been given and served as provided by section 8, be a sufficient compliance with the provisions of this Act. R.S.O. 1897, c. 285, s. 11.

Reeve to sign
on behalf of
Municipality
interested.

12. The Reeve or other head of the municipal council of any municipality shall have power on behalf of the municipal council thereof to sign the agreement aforesaid, and his signature shall be binding upon the corporation. R.S.O. 1897, c. 285, s. 12.

Requisition
for appoint-
ment by engi-
neer when no
agreement
arrived at.

13. In case an agreement as aforesaid is not arrived at by the owners at the said meeting or within five days thereafter, then the owner requiring the ditch may file with the clerk of the municipality in which such parcel is situate, a requisition (Form E), naming therein all the several parcels of land that will be affected by the ditch and the respective owners thereof, and requesting that the engineer appointed by the municipality under this Act be asked to appoint a time and place in the locality of the proposed ditch at which the said engineer will attend to make an examination as hereinafter provided. R.S.O. 1897, c. 285, s. 13.

FORM E.

(Section 13)

REQUISITION FOR EXAMINATION BY ENGINEER.

To (name of clerk), Township of , (date 190 .)

Clerk of

(P.O. address.)

Sir,—I am, within the meaning of *The Ditches and Watercourses Act*, the owner of lot (or sub-division, as in the declaration), number , in the concession of , and as such I require to construct (deepen, widen, or otherwise improve as needed), a ditch under the provisions of the said Act, for the drainage of my said land, and the following lands and roads will be affected : (here describe each parcel to be affected as in the notice for the meeting to

agree and state the name of the owner thereof), and the said owners having met and failed to agree in regard to the same, I request that the engineer appointed by the municipality for the purposes of the said Act, be asked to appoint a time and place in the locality of the proposed ditch, at which he will attend and examine the premises, hear any evidence of the parties and their witnesses, and make his award under the provisions of the said Act.

(Signature of the party or parties.)

R.S.O. 1897, c. 285, Sched. Form E.

"All the several parcels of land."

The parcels of land through which it is proposed to dig the ditch should be described with reasonable particularity so as to permit their location without difficulty.

14. The clerk, upon receiving the requisition, shall forthwith enclose a copy thereof in a registered letter to the engineer; and on receipt of the same by the engineer he shall notify the clerk in writing, appointing a time and place at which he will attend in answer to the requisition, which time shall be not less than ten and not more than sixteen clear days from the day on which he received the copy of the requisition; and on the receipt of the notice of appointment from the engineer the clerk shall file the same with the requisition and shall forthwith send, by registered letter, a copy of the notice of appointment to the owner making the requisition, who shall, at least four clear days before the time so appointed, serve upon the other owners named in the requisition a notice (Form F), requiring their attendance at the time and place fixed by the engineer, and shall, after serving such notice, indorse on one copy thereof the time and manner of service and leave the same with the indorsements thereon with the engineer not later than the day before the time fixed in the notice of appointment. R.S.O. 1897, c. 285, s. 14.

Notice to engineer and notice of appointment made by engineer.

"Shall forthwith enclose."

Should the clerk neglect or refuse to carry out the duties assigned him by this section, the Court would doubtless afford the owner aggrieved such relief as might be necessary. Neither the municipality nor the clerk have any discretion to exercise as to whether the engineer shall be called in, once the proper steps have been taken to that end. The engineer is commissioned by the Act to carry into effect the instructions of the owners who require the ditch to be made, and not the instructions of the municipality by which he was appointed to office. (*Seymour v. Tp. of Maidstone*, (1897) 24 A.R. 370 at p. 374.)

"The engineer shall notify."

In *Dagenais v. Town of Trenton* (1893) 24 O.R. 343, it was held by a Divisional Court, affirming Armour C. J., that a land-owner who desired to have a ditch constructed under the provisions of the Act, during an extended absence of the engineer, should apply for a mandamus to compel the engineer to perform his duties, or make application to the council to have a new engineer appointed, but that he could not in the first instance obtain a mandamus against the council to compel the engineer to perform his duties. In *State v. Bever* (1895) 143 Ind. 488, it was held that mandamus would lie at the suit of an interested party to compel a drainage surveyor to perform his statutory duties.

"The clerk shall file."

Reasonable remuneration must be allowed the clerk for the services performed by him. See Con. Municipal Act 1903, sec. 320 (a) and 320 (b), the text of which is incorporated above under section 4.

"The owner . . . shall . . . serve."

The required notice must be given, and an opportunity to be present and be heard at the meeting called by the engineer afforded, before an owner whose lands will be affected by the proposed ditch becomes subject to the jurisdiction of the engineer. An omission to serve any such owner, therefore, in the absence of external sources of knowledge or subsequent acquiescence in the proceedings, will leave the award open to successful attack by such owner. (*re White & Tp. of Sandwich E.* (1882) 1 O.R. 530 at p. 536; *re Hodgins & City of Toronto* (1896) 23 A.R. 80, at p. 83; *re McCrae & Village of Brussels* (1904) 8 O.L.R. 156 at p. 161; *Wright v. Wilson* (1883) 95 Ind. 408; *Hilborn v. Pickering* (1887) 23 C.L.J. 194; *Bilborrow, v. Pierce*, (1907), 101 Minn. 271. But see *York v. Tp. of Osgoode* (1893) 24 O.R. 12 at p. 24).

"The other owners."

It has been held that an owner who has failed to put his title on record has no ground of complaint if he fails to receive notice of drainage proceedings. (*Bell v. Cox* (1889) 122 Ind. 153). And that a purchaser of land during the pendency of the proceedings is bound by the notice served on his predecessor in title. (*Chaney v. The State* (1888) 118 Ind. 494.)

FORM F.

(Section 14.)

NOTICE OF APPOINTMENT FOR EXAMINATION BY ENGINEER.

Township of _____ (date) 190 ____
 To (Name of owner).
 (P.O. Address).

SIR—You are hereby notified that the engineer appointed by the municipality for the purposes of *The Ditches and Watercourses Act*, has, in answer to my requisition, fixed the hour of _____ o'clock in the noon of _____ day, the _____ day of _____ to attend at (name the place appointed) and to examine the premises and site of the ditch required by me to be constructed under the provisions of the said Act (or as the case may be), and you, as the owner of lands

affected, are required to attend, with any witnesses that you may desire to have heard, at the same time and place.

Yours, ect.,

(Signature of applicant).

R.S.O. 1897, c. 285, Sched. Form F.

15. (1) Notices under the provisions of this Act shall be served personally, or by leaving the same at the place of abode of the owner or occupant, with a grown up person residing thereat, and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence, and where that is not known, he may be served in such manner as the Judge may direct.

Mode of serving notices

(2) Any occupant not the owner of the land, notified in the manner provided by this Act, shall immediately notify the owner thereof, and shall, if he neglects to do so, be liable for all damages suffered by such owner by reason of such neglect. R.S.O. 1897, c. 285, s. 15.

Occupant to notify owner.

"By leaving the same at the place of abode." 11

It was held by Boyd C. in *re Stephens & Tp. of Moore* (1894) 25 O.R. 600, that service of a copy of a drainage by-law upon a grown-up person, at a house upon the assessed premises was a sufficient service upon all the owners who lived there.

16. (1) The engineer shall attend at the time and place appointed by him in answer to the requisition, and shall examine the locality, and if he deems it proper, or if requested by any of the owners, may examine the owners and their witnesses present, and take their evidence, and may administer an oath or affirmation to any owner or witness examined by him. If upon examining the locality the engineer is of opinion that the lands of owners upon whom notice has not been served will be affected by the ditch, he shall direct that the notice required by section 14 shall be served on such owners by the owner making the requisition and shall adjourn the proceedings to the day named in the notice for continuing the same for the purpose of allowing such owners to be present and to be heard upon the examination and taking of evidence.

Examination by engineer.

(2) The engineer may adjourn his examination and the hearing of evidence from time to time, and if he finds that the ditch is required he shall, within thirty days after his first attendance make his award in writing (Form G), specifying clearly the location, description and course of the ditch, its commencement and termination, apportioning the work and the furnishing of material among the lands affected and the owners thereof, according to his estimate of their respective interests in the ditch, fixing the time for performance by the respective owners, apportioning the maintenance of the ditch among all or any of the owners, so that as far as practicable each owner shall maintain the portion on his own land; and stating the amount of his fees and the other charges and by whom the same shall be paid. R.S.O. 1897, c. 285, s. 16.

2a. The period prescribed for the engineer to make his award shall be exclusive of the time required to obtain the approval of the works or the specifications or plans thereof by the Board of Railway Commissioners for Canada where such approval is necessary. 4 Edw. VII., c. 10, s. 62.

(3) In any case where a ditch is to be covered, the engineer shall in his award specify the kind of material to be used in the covered portion of such ditch. R.S.O. 1897, c. 285, s. 16.

"The engineer shall attend."

The engineer is under a statutory obligation to perform the duties entrusted to him by the Act, but should he fail to do so the owner who has served the requisition may apply to the council to have a new engineer appointed in his stead. (See *Dagenais v. Town of Trenton* (1893) 24 O.R. 343; *State v. Beven* (1895) 143 Ind. 488, cited above under section 14.)

"Shall examine the locality."

The engineer should make such an examination of the locality to be drained as will enable him to form an intelligent opinion as to the benefit that will accrue to each parcel of land from the construction of the ditch. (re *Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399 at pp. 404, 406; *Swamp Land Dist. No. 307 v. Gwynn* (1886) 70 Cal. 566 at p. 568.) He should make the examination in person, and is not authorized to delegate his powers to an assistant. (re *Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423 at p. 431; *Tp. of Elizabethtown v. Tp. of Augusta* (1901) 2 O.L.R. 4 at p. 17.)

"The owners ... present."

If a landowner who has not received notice of the meeting voluntarily appears and gives evidence, and takes no objection to the jurisdiction of the engineer, he will be considered to have waived any right he might have had to attack the award on this ground. (*Maisonneuve v. Tp. of Roxborough* (1899) 30 O.R. 127 at pp. 129, 132; *Ross v. Board of Supervisors of Wright County* (1905) 104 N.W.R. 506; 128 Iowa 427.)

"Within thirty days."

In *Bigford v. Baile* (1904) 40 C. L. J. 785, Reynolds J.J.C.C. held that this is a directory provision and not imperative, and declined to set aside an engineer's award on the ground that it had not been made until after the expiration of thirty days from the date of the first meeting. This decision is in agreement with cases determined upon a construction of analagous provisions of this Act and of the Municipal Drainage Act. (*Maisonneuve v. Tp. of Roxborough* (1899) 30 O.R. 127 at p. 131; *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226 at pp. 238, 241.) See also *Re Tp. of Muskoka & Village of Gravenhurst* (1884) 6 O.R. 352 at p. 355; *Re Smith & Tp. of Plympton* (1886) 12 O.R. 20 at pp. 34, 35.

"Make his award."

In delivering judgment in *Turtle v. Tp. of Euphemia* (1900) 31 O.R. 404, Meredith J. said (p. 405): "The power to make any such award is wholly statutory, and, unless made by the person empowered to make it, it is not an award under the Act at all." And he held, that as the person who assumed to act as engineer had never been properly appointed to the office after the manner set out in the Act, his award was invalid and should be set aside.

FORM G.

(Section 16.)

AWARD OF ENGINEER.

I, _____ of _____ the engineer appointed by the municipality of the _____ in the county of _____ under the provisions of *The Ditches and Watercourses Act*, having been required so to do by the requisition of _____ owner of lot number _____ in the concession of the township of _____ (describe as in requisition), filed with the clerk of the said municipality and representing that he requires certain work to be done under the provisions of the said Act for the draining of the said land, and that the following other lands (and roads) will be affected;—(here set out the other parcels of lands or roads affected as in the requisition), did attend at the time and place named in my notice in answer to said requisition, and having examined the locality (and the parties and their witnesses if such be the case) find that the ditch (or the deepening or widening of a ditch) is required. The location, description and course of the ditch and its point of commencement and termination are as follows:

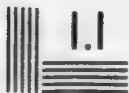
(Here describe the ditch as to all above particulars.)

The said work will affect the following lands:—(here set forth the other lands and their respective owners.) I do, therefore, award and apportion the work and the furnishing of material among the lands affected and the owners thereof according to my estimate of their respective interests in the said work as follows:—



MICROCOPY RESOLUTION TEST CHART

ANSI and ISO TEST CHART No. 2



APPLIED IMAGE Inc.

1. (Name of owner and description of his land) shall make and complete (here fix the point of commencement and ending of his portion) and shall furnish the material (state what material) all of which according to my estimate, will amount in value to \$, and I fix the time for the performance of such work and providing such material on the day of A.D. 190 , at furthest.

2. (Name of owner and description of his land and so on as above to the end.)

I do further award and apportion the maintenance of the ditch as follows —

1. (Name of owner and description of his land) shall maintain (here fix the point and commencement and ending of his portion).

2. (Name of owner, etc., as above.)

My fees and the other charges attendant upon and for making this award are (here give fees and other charges, including clerk's fees in detail) amounting in all to \$, which shall be borne and paid as follows:—state by whom and by what lands respectively.)

Dated this day of , A.D. 189

Witness

} Signature of Engineer.

R.S.O. 1897, c. 285, Sched. Form G.

"Specifying clearly the location — and course of the ditch."

The engineer's duty is to locate a ditch which will furnish the desired relief to the lands of the interested owners. (*re Misener & Tp. of Wainfleet* (1882) 46 U.C.Q.B. 457 at p. 465; *re McDonald v. Village of Alexandria* (1903) 2 O.W.R. 637). If he accomplishes this object his award will not be reviewed or set aside on the ground that he might have selected a shorter or less expensive course, as his findings in such matters, reasonably exercised, will not be interfered with. (*re Roberts & Holland* (1871) 5 P.R. 346 at p. 353; *Furness v. Gilchrist* (1889) 25 C.L.J. 64; *Stout v. Chosen Freeholders, etc., of Hopewell* (1885) 25 N.J.L.R. 202; *Bonfoy v. Goar* (1894) 140 Ind. 292 at p. 296; *Willson v. Talley* (1895) 144 Ind. 74 at p. 80; *Zigler v. Menges* (1889) 121 Ind. 99.)

"Its commencement and termination."

The award should describe clearly the point of commencement, the course and the point of outlet for the ditch. (*Tp. of Dover v. Tp. of Chatham* (1884) 5 O.R. 325 at p. 345; Note also the wording of the form of award, Form G.) And an award which did not afford sufficient information on these points was set aside by the Court. (*Dawson v. Murray* (1869) 29 U.C.Q.B. 464.)

"Among the lands affected."

The lands to be charged with a share of the work should be designated or described with such exactness that there can be no difficulty in identifying them. (*County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523 at p. 537; *re Jenkins & Tp. of Enniskillen* (1891) 25 O.R. 399 at p. 406; *Carridy v. Tp. of Mountain* (1897) 17 C.L.T. Occ. N. 417; *Zigler v. Menges* (1889) 121 Ind. 99.)

"Fixing the time for performance."

In *Murray v. Dawson* (1867) 17 U.C.C.P. 588 an award which failed to specify the time to be allowed one of the parties for con-

structing his share of the ditch was held to be invalid and this decision was afterwards approved in *Kelly v. O'Grady* (1873) 34 U.C.Q.B. 562 at p. 569. But it would seem to be more in agreement with the mode of construction adopted in the more recent decisions upon the Act that in such a case the award should be amended by appeal to the county court judge, by having a reasonable time fixed for the doing of the work and allow the amended award to stand. (*Smith v. Tp. of Raleigh* (1882) 3 O.R. 405 at p. 410; and see *Dawson v. Murray* (1869) 29 U.C.Q.B. 464.)

"Apportioning the maintenance."

See *Kelly v. O'Grady* (1873) 34 U.C.Q.B. 562 cited under section 17 below.

17. Should the engineer be of the opinion that the land of any owner will not be sufficiently affected by the construction of the ditch to make him liable to perform any part thereof, and that it is necessary or not, as the case may be, to construct the ditch across or into his land, he may, by his award, relieve such owner from performing any part of the work of the ditch and place its construction on the other owners; and any person carrying out the provisions of the award upon the land of the owner so relieved shall not be considered a trespasser while causing no unnecessary damage, and he shall replace any fences opened or removed by him. R.S.O. 1897, c. 285, s. 17.

Engineer may order opening of ditch across land of a person not benefited.

"Any person carrying out the provisions of the award...shall not be considered a trespasser."

The effect of such a provision in an award was the subject of consideration in *Kelly v. O'Grady* (1873) 34 U.C.Q.B. 562. In this case Richards C. J., in delivering the judgment of the Court, said (p. 574): "The reasonable interpretation to put on this statute when the fence viewers award that a drain shall be constructed through one man's land for the benefit of the land of another, is that the award shall be considered as the grant of an easement on the land through which the ditch is to be cut, and so long as the award remains unchanged, the nature of the easement and the rights of the parties must be governed by the award." It is therefore binding on successors in title. (*Kelly v. O'Grady* (1873) 34 U.C.Q.B. 562 at p. 572.)

But if the award proves to be invalid, the entry becomes a trespass, unless the facts support a plea of leave and license. (*Dawson v. Murray* (1869) 29 U.C.Q.B. 464; *Lamphier v. Stafford* (1902) 1 O.W.R. 320.) And in such case, or where the defendant has exceeded the rights conferred upon him by a valid award, the plaintiff is entitled at least to nominal damages, because a right of property is directly affected, even although a jury may have found as a fact that no damage has been sustained. *Warren v. Deslappes* (1872) 33 U.C.Q.B. 59 at p. 68; *Harvey v. Railroad Co.* (1906) 129 Iowa 465; *Freed v. Stuart* (1907) 147 Mich. 31.) A

landowner's right of action for trespass in constructing and maintaining a ditch through his land without legal authority is a continuing right and is not subject to prescription. (*Town of Trenton v. Archibald* (1901) 31 S.C.R. 380.)

Upon the subject of trespass by constructing a ditch without statutory authority the following additional authorities may be consulted. (*Van Egmond v. Town of Seaforth* (1884) 6 O.R. 590 at p. 610; *McArthur v. Town of Collingwood* (1885) 9 O.R. 368; *Pratt v. City of Stratford* (1888) 16 A.R. 5 at p. 16; *Lawrence v. Town of Ower Sound* (1903) 5 O.L.R. 369; *Woodruff v. Fisher* (1853) 17 Barb. N.Y. 224 at p. 235; *Hildreth v. City of Lowell* (1858) 11 Gray (Mass.) 345.)

Filing award,
notice to per-
sons affected.

18. The engineer shall forthwith, after making his award as hereinbefore provided, file the same, and any plan, profile or specifications of the ditch, with the clerk of the municipality in which the land requiring the ditch is situate, but should the lands affected lie in two or more municipalities, the award and any plan, profile or specifications shall be filed by the engineer with the clerk of each municipality, and may be given in evidence in any legal proceedings by certified copy, as are other official documents; and the clerk of the municipality or of each of the municipalities, shall forthwith upon the filing of the award, notify each of the persons affected thereby within the municipality of which he is clerk, by registered letter or personal service, of the filing of the same, and the portion of work to be done and material furnished by the person notified as shown by the award, and the clerk shall keep a book in which he shall record the names of the parties to whom he has sent notice, the address to which the same was sent, and the date upon which the same was deposited in the post office or personally served. R.S.O. 1897, c. 285, s. 18.

"The engineer shall forthwith...file the same."

Mandamus would apparently lie against the engineer to compel him to perform his duty. (*Warren v. Deslippe* (1872) 33 U.C.Q.B. 59 at p. 66; *Dagenais v. Town of Trenton* (1893) 24 O.R. 343, at p. 348.)

"With the clerk of the municipality."

"The clerk being a public officer, the report, plans, etc., are open to inspection by any person whose interests may be affected by the contemplated work." *Lister J.A.*, in delivering the judgment of the Court of Appeal in, *Priest v. Tp. of Flos* (1901) 1 O.L.R. 78 at p. 81.

"May be given in evidence...by certified copy."

In *Warren v. Deslippe* (1872) 33 U.C.Q.B. 59. (decided before the Act defined an award as an official document or authorized its being proved by certified copy) Wilson J., in delivering the judgment of the Court said (p. 67): "I am of opinion...that it may properly be said this award is a document of so public a nature as to be admissible in evidence on its mere production from the proper custody; and therefore, that an examined copy, or a copy purporting to be signed and certified as a true copy by the officer to whose custody the original has been entrusted, is admissible in place of the original." It was held in the same case (p. 66) that a mandamus would lie to compel the delivery of a copy of the award.

19. If the lands affected by the ditch are situated in two or more municipalities, the engineer of the municipality in which proceedings were commenced shall have full power and authority to continue the ditch into or through so much of the lands in any other municipality as may be found necessary, but within the limit of length as hereinbefore provided, and all proceedings authorized under the provisions of this Act shall be taken and carried on in the municipality where commenced. R.S.O. 1897, c. 285, s. 19.

Powers of engineer of municipality in which proceedings commenced.

20. In every case where lands or roads in two or more municipalities are affected the clerk of the municipality in which proceedings were commenced shall forward to the clerk of each of the other municipalities a certified copy of every certificate affecting or relating to lands or roads therein respectively, and the municipal council thereof shall pay the sum for which lands and roads within its limits are liable to the treasurer of the municipality in which proceedings were commenced, and unless the amounts are paid within fourteen days after demand in writing by the parties declared by the certificate liable to pay the same, such council shall have power to take all proceedings for the collection of the sums so certified to be paid, as though all the proceedings had been taken and carried on within its own limits. R.S.O. 1897, c. 285, s. 20.

Certificates relating to lands or roads in adjoining municipalities.

"A certified copy of every certificate."

That is to say a certified copy of every certificate issued by the engineer under section 29 to a contractor who has completed the portion of the ditch which had been allotted to a defaulting owner, or to a contractor for rock-cutting or blasting under sec. 31 (1). Section 18 provides for the filing of a copy of the award with the clerk of such municipality.

The municipal council thereof shall pay."

The municipality within which the proceedings were commenced has no authority to make a levy upon lands situate in an adjoining municipality. (*Broughton v. Tps. of Grey & Elma* (1897) 27 S.C.R. 495 at p. 500.)

Culverts, etc.,
on railway
lands

21. (1) The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any ditch or culvert on the lands of such railway company, and for the payment of the cost of such work after completion out of the general funds of the municipality, and the council shall have power to assess and levy the amount so paid exclusive of any part thereof for which the municipality may be liable under the award as to the cost of the work in the same manner as taxes are levied upon the lands mentioned in the award and in the relative proportions of the estimated cost of the work to be done and materials furnished by the respective owners in the construction of such ditch; and such assessment shall in every case be determined by a supplementary award made by the engineer, and subject to appeal to the Judge in the same manner as other awards made under this Act.

(2) No agreement with a railway company shall be entered into by a municipal council under this section which will impose a special liability on the owners without the consent in writing, filed with the clerk of the municipality, of two-thirds of the owners liable for the construction of the ditch in respect to which such work on railway lands is to be undertaken.

(3) The cost of any such work on railway lands shall be exclusive of the sum fixed as the limit of the cost of the work imposed by section 5 of this Act. R.S.O. 1897, c. 285, s. 21.

"May enter into an agreement."

The Legislature cannot authorize an entry upon the lands of a railway company operating under a charter of the Dominion of Canada, for the purpose of constructing or repairing a ditch across such lands. (*Miller v. Grand Trunk Ry.* (1880) 45 U.C.Q.B. 222; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636.) The construction or repair of ditches across the lands of such railway companies as are subject to the legislative authority of the Province

is to be proceeded with in the manner provided for by The Railway, Ditches and Watercourses Act (R.S.O. 1897, Ch. 286) which is to be read as part of the Act. See further on this subject The Ontario Railway Act 1906 (6 Edw. VII. Ch. 30) secs. 84 and 85, incorporated above under section 85 of The Municipal Drainage Act. And also sections 250 and 251 of the Railway Act, Canada (R. S. C. 1906, c. 37) at p. 313 below.

22. (1) Any owner dissatisfied with the award of the engineer, and affected thereby, may, within fifteen clear days from the date of the mailing or service of the last of the notices of the filing of the award as provided in section 18, appeal therefrom to the Judge, and the proceedings on the appeal shall be as hereinafter provided. R.S.O. 1897, c. 285, s. 22 (1); 7 Edw. VII., c. 48, s. 1.

Appeals from
award to
County Judge.

(2) The appellants shall serve upon the clerk of the municipality in which proceedings for the ditch were initiated, a notice in writing of his intention to appeal from the award, shortly setting forth therein the grounds of appeal.

Notice of
appeal

(3) The clerk, in the next preceding subsection mentioned, shall, after the expiration of the time for appeal, forward by registered letter or deliver a copy of the notice or notices of appeal and a certified copy of the award, and also the plans and specifications (if any) to the Judge, who shall forthwith upon the receipt of the registered letter, or documents aforesaid, notify the clerk of the time he appoints for the hearing thereof, and shall fix the place of hearing at the town hall or other place of meeting of the council of the municipality in which proceedings for the ditch were initiated, unless the Judge for the greater convenience of the parties and to save expense fixes some other place for the hearing. The Judge may if he thinks proper order such sum of money to be paid by the appellant or appellants to the said clerk as will be a sufficient indemnity against costs of the appeal; and the clerk upon receiving notice from the Judge, shall forthwith notify the engineer whose award is appealed against, and all parties interested, in the manner provided for the service of notices under this Act.

Clerk to notify
Judge and
Judge to fix
time and place
for hearing

Inspection of
premises by
another
engineer

(4) Any appellant may have the lands and premises inspected by any other engineer or person who, for such purposes, may enter upon such lands and premises, but shall do no unnecessary damage.

Clerk of the
Court

(5) The clerk of the municipality to whom notice of appeal is given shall be the clerk of the court, and shall record the proceedings.

Judge to hear
and determine
within two
months

(6) It shall be the duty of the Judge to hear and determine the appeal or appeals within two months after receiving notice thereof from the clerk of the municipality as hereinbefore provided or within such further period as the Judge on hearing the parties may decide to be necessary in order to allow proper inspection of the premises to be made as authorized by the next following subsection. R.S.O. 1897, c. 285, s. 22 (2)-(6); 1 Edw. VII., c. 12, s. 22.

Powers of
Judge on
appeal

(7) The Judge on appeal may set aside, alter or affirm the award and correct any errors therein; he may examine parties and witnesses on oath, and may inspect the premises and may require the engineer to accompany him; and should the award be affirmed or altered, the costs of appeal shall be in his discretion, but if set aside he shall have power to provide for the payment of the costs in the award mentioned, and also the costs of appeal, and may order the payment thereof by the parties to the award, or any of them, as to him may seem just, and may fix the amount of such costs.

Depriving
engineer of
fees when
guilty of mis-
conduct.

(8) In case the Judge on an appeal finds that the engineer has through partiality or from some other improper motive, knowingly and wilfully favoured unduly any one or more of the parties to the proceedings, or has neglected his duty, he may direct that the engineer be deprived of all fees in respect to the award or of such part thereof as the Judge may deem proper. But such order shall not deprive any party to the proceedings of any remedy he may otherwise have against the engineer. R.S.O. 1897, c. 285, s. 22 (8); 4 Edw. VII., c. 10, s. 63.

(9) The Judge shall be entitled to charge for holding court for the trial of appeals under this Act, and for the inspection of the premises the sum of five dollars a day, which charge shall be considered part of the costs of appeal under the provisions of the next preceding subsection.

Fees and disbursements of Judge

(10) The award as so altered or affirmed shall be certified by the clerk together with the costs ordered, and by whom to be paid, and shall be enforced in the same manner as the award of the engineer, and the time for the performance of its requirements shall be computed from the date of such judgment in appeal; and the clerk shall immediately after the hearing, send by registered letter, to the clerk of any other municipality in which lands affected by the ditch are situate, a certified copy of the changes made in the award by the Judge, which copy shall be filed with the award, and each clerk shall forthwith by registered letter notify every owner within his municipality of any change made by the Judge in the portion of work and material assigned to such owner. R.S.O. 1897, c. 285, s. 22 (7)-(10).

Enforcement of award as amended.

"Any owner dissatisfied with the award."

COMPENSATION FOR LAND TAKEN OR INJURIOUSLY AFFECTED. - As has been pointed out by Lister J.A. in *re McLellan v. Tp. of Chinguacousy* (1900) 27 A.R. 355 at p. 362: "while the Act authorizes the construction of a drainage work it imposes no liability for the payment of compensation for damage resulting from the work." And again, at p. 363: "It... creates no liability for compensation for lands entered upon, taken, used for, or for damages resulting from, a work authorized by a valid award made under its provisions. The rights and liabilities of the parties to such an award for or in respect of anything lawfully done under it, must be enforced and worked out under the provisions of the Act." (See also *Chapman v. McEwan* (1905) 6 O.W.R. 164 at p. 167.)

This being so, if the construction of the proposed ditch will injure the land of any owner party to the award to an extent sufficient to offset any benefit he will derive from it, it would seem proper that the engineer should adjust the matter equitably by relieving such owner from the performance of any part of the work under the powers conferred by section 17, and that a proportionate adjustment should be made in a case where the injury although considerable is outweighed by the benefit that will accrue to the land in question. If, however, the construction of the ditch on the proposed course would manifestly result in serious injury to any parcel of land included in the award, in excess of any possible benefit, since no provision is made by the Act for compensation in such a case, it would seem to follow on ordinary principles of

justice that the award should be amended by altering the course of the drain in such manner as to prevent such injury arising. An appeal as provided by this section would be the proper proceeding for an owner party to the award aggrieved in any matter of this kind. No other relief is open to him. (*re Cameron & Kerr* (1866) 25 U.C.Q.B. 534 at p. 535, *re McLellan & 1p. of Chingacousy* (1900) 27 A.R. 355 at p. 359.)

Where it is proposed to take advantage of the Act to drain lands used for mining or manufacturing purposes, compensation may be awarded the owners of any lands through which the ditch is carried for any injury resulting to their lands. (sec. 2a.)

DAMAGES.—Third parties, that is to say persons who are not parties or privies to an award are not bound by it. (*McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446 at p. 452.) They are therefore free to assert their rights by action in case of any injury to their lands occasioned by the construction of a ditch under the provisions of the Act, and are not bound to seek redress in the manner provided for by this section.

If for any sufficient reason jurisdiction has never been acquired and the proceedings are, therefore, invalid, the parties to the award are answerable in an action to third parties whose lands are injured by the construction or operation of the ditch. As in a case where the ditch does not conduct the water collected by it to a sufficient outlet, contrary to section 5 of the Act, and the lands of neighbouring proprietors are flooded as a consequence. (*McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446.) Or where the award has been made by a person without authority, as an engineer who has never been properly appointed to office. (*Turtle v. Tp. of Euphemia* (1900) 31 O.R. 404.)

A party to an award is answerable in damages for such injuries as are occasioned by his negligence or lack of due care in performing his share of a valid award. (*Stonehouse v. Tp. of Enniskillen* (1872) 32 U.C.Q.B. 562.)

But a township is not liable for the damage caused by a ditch which has been completed under a defective award, unless it has been a party to the award and has occasioned the injury complained of. The engineer in such a case is the agent of the owners who are parties to the award, and does not represent the municipality that appointed him to office. (*Seymour v. Tp. of Maidstone* (1897) 24 A.R. 370.) But in a case where the award proved defective, and the defendant township had by digging a connecting ditch, afforded the water a means of access to the land of the plaintiff it was held liable for the resulting injury. (*McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636.)

"Any owner may appeal."

This section should be read in conjunction with section 24 by which it is provided that every award shall after the lapse of the time limited for appeal and after the determination of any appeals be valid and binding to all intents and purposes. It has been held, upon a construction of this section, that, if the proceedings are within the protection of the Act, the remedy of appeal here provided for, is the only relief available to a dissatisfied owner who has been made a party to the award. In *McLennan v. Tp. of Chingacousy* (1900) 27 A.R. 355, at p. 359, Moss J.A. expressed the law upon this point as follows: "The appellants having taken . . . all the proper steps to lead to an award, the engineer had

jurisdiction to deal with the matter and make an award, and the only remedy of an owner party to the proceedings dissatisfied with the award was an appeal to the County Judge under sec. 22. That section confers upon the County Judge the amplest powers to set aside, alter or affirm the award and correct any errors therein. But if the award be not appealed from, or being appealed from is not set aside it is valid and binding to all intents and purposes. sec. 24." (See also *re Cameron & Kerr* (1866) 25 U.C.Q.B. 533 at p. 535; *York v. Tp. of Osgoode* (1893) 24 O.R. 12 at p. 26).

Proceedings under the Act do not involve any question of title to land, or any interest therein, and no appeal will lie to the Supreme Court in an action brought to restrain a township engineer from proceeding to clean out a ditch made under the Act, where the proper steps have been taken to acquire jurisdiction. *Waters v. Manigault* (1900) 30 S.C.R. 304.

If an owner objects to the award on the ground that his land will not be benefited, or will not be benefited proportionately to the work assigned him, by the construction of the proposed ditch, he must raise this question by entering an appeal under the provisions of this section or not at all. In *Tp. of McKillop v. Tp. of Logan* (1899) 29 S.C.R. 702 at p. 714, Gwynne J. said in this connection: "That contention (i.e. that the ditch was of no benefit to their lands) would, it may be admitted, have been a good objection to the award upon an appeal under the 22nd section of the statute, and the Coleman trust estate could have obtained adequate and perfect relief in so far as that objection is concerned under the provisions of that section, but no such contention can be entertained as a defence to the present action." (See also *York v. Tp. of Osgoode* (1893) 24 O.R. 12 at p. 26; *re White & Tp. of Sandwich E.* (1882) 1 O.R. 530; *re McLean & Tp. of Ops* (1880) 45 U.C.Q.B. 325; *re Stephens & Tp. of Moore* (1894) 25 O.R. 600.)

But if through failure to comply with some requirement of the Act, compliance with which is necessary to vest jurisdiction in the engineer, the proceedings are invalid, the award is open to attack in an action, and in such case interested parties are not bound to proceed by appeal under this section. (*Tp. of Osgoode v. York* (1894) 24 S.C.R. 282; *Tp. of McKillop v. Tp. of Logan* (1899) 29 S.C.R. 702; *Tp. of Colchester N. v. Tp. of Gosfield N.* (1900) 27 A.R. 281; *Turtle v. Tp. of Euphemia* (1900) 31 O.R. 404; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636.)

Persons affected by the award who have not been made parties to it have an independent remedy at law, and are not restricted to the appeal provided for by this section. In delivering the judgment of the Court of Appeal in *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, at p. 452, Garrow J.A. said as follows: "In my opinion a third party, that is a person not a party or privy to the award cannot be affected by it. It would, I think, be contrary to every settled principle if he could. He receives no notice of the proceedings. He may be a non-resident, and yet it is said his property may be, behind his back, injuriously affected, and in fact, confiscated without remedy, except such, if any, as he may be able to obtain under the Act. Nothing in the Act requires such an extraordinary effect to be given to the award." Upon this point see also *Bilsborrow v. Pierce* (1907) 101 Minn. 271, a parallel decision and *Waters v. Manigault* (1900) 30 S.C.R. 304.

"Within fifteen clear days."

It has been held by Armour C.J. (*re McLellan & Tp. of Chinguacousy* (1898) 18 P.R. 246) that if no evidence is adduced to

show that the award has been filed and the required notices of filing served, an objection that the appeal has not been entered in time will not be allowed to prevail.

In computing time under the Municipal Drainage Act, it has been held that time which elapses during long or short vacation should not be reckoned. (*re Tp. of Raleigh & Tp. of Hurwich* (1888) 18 P.R. 73). This decision proceeds upon the fact that the rules of practice of the High Court are made applicable to that Act, and for that reason would probably be distinguishable in a case arising under this section. (See *Canada Sand Co. v. Ottawa* (1877) 15 O.L.R. 128.)

The appellant shall serve a notice in writing

It has been held by Street J. upon a motion to quash a drainage by-law passed under the provisions of The Municipal Drainage Act (*re Municipality of Tp. of Howard* (1889) 18 O.R. 260) that the notice of intention to appeal required by that Act must be given by or on behalf of the actual applicant named in it, that the municipality were entitled to know in advance the name of the contesting party, and therefore that a person who had not given the required notice could not take advantage of a notice given by or on behalf of another.

The notice of appeal should set out with reasonable exactness the grounds upon which the appellant objects to the engineer's award. But it would seem that the courts will not be hypercritical in this respect and in a proper case more extensive relief may be granted than is claimed in the notice of appeal, providing that the parties have not been misled by the insufficiency of the notice. (*Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226 at p. 238.)

The following form of notice of appeal may be of service.

In the matter of the Ditches and Watercourses Act.

To
Clerk of the of
(Address)

Sir,

Take notice that I of the of, an owner affected by the award of, the engineer appointed by the said municipality for the purposes of the said Act, which award is dated the day of A.D. and awarding the construction of a certain ditch known as intend to appeal and do hereby appeal from the said award to His Honor Judge of the County Court of the County of, for the following, amongst other, reasons

- 1.
- 2.

Dated at the day of A.D. 1907

C.D. or C.D. by his solicitor E.F.

"It shall be the duty of the Judge to hear and determine et. c."

In delivering judgment of the Court in *re Cameron & Kerr* (1866) 25 U.C.Q.B. 533, at p. 535, Draper C.J. said: "The whole frame of this Act convinces us that the legislature intended to provide for the summary and final determination of the matters comprised within its scope, and erected a jurisdiction whose award

made within and pursuant to the provisions thereof was intended to be conclusive." That the decision of the County Court Judge is final in all cases where an appeal to him is the only recourse open to the parties is a well established principle. (*York v. Tp. of Osgoode* (1892) 24 O.R. 12, at pp. 15, 21; *McLennan v. Tp. of Chinguacousy* (1900) 27 A.R. 355, at p. 359; *Chapman v. McEwan* (1905) 6 O.W.R. 164, at p. 167.)

"Within two months."

This provision is directory only and the failure of a judge to deliver judgment within the time limited will not render him functus officio. (*McFarlane v. Miller* (1895) 26 O.R. 516; *re Ronald & Village of Brussels* (1882) 9 P.R. 232; *Bigford v. Baile* (1904) 40 C.L.J. 785.)

"The Judge may set aside the award."

Any of the following grounds, if established, would be sufficient to invalidate the award.

If the party who initiated the proceedings is not an owner within the definition given by the Act. (*York v. Tp. of Osgoode* (1894) 24 S.C.R. 282; *Tp. of McKillop v. Tp. of Logan* (1899) 29 S.C.R. 702.) If the ditch is not carried to a sufficient outlet. (*McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636, at p. 644; *McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 460; *Chapman v. McEwan* (1905) 6 O.W.R. 164, at p. 167). Or if it should pass through more than seven original township lots without the assent of the municipality having first been obtained. (*Seymour v. Tp. of Maidstone* (1897) 24 A.R. 370 at p. 374). Or should exceed the limit of cost prescribed by section 5. And in a case where the engineer has never been properly appointed to office. (*Turle v. Tp. of Euphemia* (1900) 31 O.R. 404. Or where he has never taken the prescribed oath of office. (*Tp. of N. Colchester v. Tp. of N. Gosfield* (1900) 27 A.R. 281.) If the award should assess, or project the ditch across, the lands of a railway company operation under a charter of the Dominion of Canada, unless an agreement has first been reached with such company. (*Miller v. Grand Trunk Ry.* (1880) 45 U.C.Q.B. 222; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636.) Or if the award should be defective in any of the following respects. In not sufficiently defining the course and termini of the ditch. (*Tp. of Dover v. Tp. of Chatham* (1884) 5 O.R. 325, at p. 335; *Dawson v. Murray* (1869) 29 U.C.Q.B. 464.) In not sufficiently defining the parcels of land liable for the construction and maintenance of the ditch. (*County of Essex & Tp. of Rochester* (1878) 42 U.C.Q.B. 523, at p. 537; *re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399, at p. 406). If it does not limit a time within which the ditch is to be completed. (*Murray v. Dawson* (1867) 17 U.C.C.P. 588; *Kelly v. O'Grady* (1873) 34 U.C.Q.B. 562, at p. 569.) Or if the award is not based upon a personal and accurate examination by the engineer of the locality to be drained. (*re Jenkins & Tp. of Enniskillen* (1894) 25 O.R. 399, at p. 404; *re Robertson & Tp. of N. Easthope* (1888) 15 O.R. 423, at p. 431.) If the appellant has not been served with notice of the meeting called by the engineer and has not been present at such meeting. (*re Hodgins & City of Toronto* (1896) 23 A.R. 80, at p. 83; *re McCrae & Village of Brussels* (1904) 8 O.L.R. 156 at p. 161.)

If the ditch when constructed will be of no benefit to the lands of the appellant, or of less benefit than is found by the engineer, the award should be amended in this respect. (See cases collected under sec. 6.)

"May inspect the premises."

The parties or their solicitors should have notice of the intended inspection and an opportunity to be present. (*McKim v. Tp. of E. Luther* (1901) 1 O.L.R. 89.)

If an examination of the locality to be drained is made by the Judge he should put in writing a statement of the conclusions reached by him as a result of the view. (*re MacPherson & City of Toronto* (1895) 26 O.R. 558.)

"May fix the amount of such costs."

No provision is made by the Act for the taxation of costs, nor is there any scale of costs made applicable to proceedings under it, except for the payment of necessary witness fees. (sec. 26.)

"Or has neglected his duty."

This phrase was added in 1904 by 4 Edw. VII. Ch. 10, sec 63.

"Which copy shall be filed."

See *Thackery v. Tp. of Raleigh* (1898) 25 A.R. 226, at p. 241, 238, cited above under sec. 9.

Judge may
amend or refer
back award.

23. No award made by an engineer under this Act shall be set aside by the Judge for want of form only or on account of want of strict compliance with the provisions of this Act, and the Judge shall have power to amend the award or other proceedings, and may in any case refer back the award to the engineer with such directions as may be necessary to carry out the provisions of this Act. R.S.O. 1897, c. 285, s. 23.

The authority to amend or refer back an award conferred upon the Judge by this section is much more comprehensive than that vested in the Drainage Referee by the corresponding section of The Municipal Drainage Act. (See sec. 89 (3) of the Municipal Drainage Act above.)

When award
to be binding
notwithstand-
ing defects.

24. Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the Judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defects in form or substance either in the award or in any of the proceed-

ings relating to the works to be done thereunder taken under the provisions of this Act. R.S.O. 1897, c. 285, s. 24.

This section validates only such awards as have been made under the provisions of the Act. If jurisdiction has never been acquired the section has no curative effect. (*Tp. of Osgoode v. York* (1894) 24 S.C.R. 282; *Tp. of McKillop v. Tp. of Logan* (1899) 29 S.C.R. 702; *Tp. of Colchester N. v. Tp. of Gosfield N.* (1900) 27 A.R. 281; *Turtle v. Tp. of Euphemia* (1900) 31 O.R. 404; *McCrimmon v. Tp. of Yarmouth* (1900) 27 A.R. 636.)

If however jurisdiction has been once acquired the award is not open to attack in any other manner than by appeal to the Judge as provided by section 22, and no appeal lies from his decision. (*re Cameron & Kerr* (1866) 25 U.C.Q.B. 533, at p. 535; *York v. Tp. of Osgoode* (1893) 24 O.R. 12, at p. 26; *McLellan v. Tp. of Chinguacousy* (1900) 27 A.R. 355, at p. 359.)

But a person who is not a party nor a privy to an award is not bound by it and has an independent remedy by action. (*McGillivray v. Tp. of Lochiel* (1904) 8 O.L.R. 446, at p. 452.)

Irregularities in the proceedings which have not been taken advantage of on an appeal to the Judge, or which have been urged unsuccessfully before him are cured by this section. (*Maisonneuve v. Tp. of Roxborough* (1899) 30 O.R. 127, at p. 133.)

25. In all appeals under this Act from the engineer's award the Judge shall possess all such powers for compelling the attendance of, and for the examination on oath, of all parties and other persons as belong to or might be exercised by him in the Division Court or in the County Court. R.S.O. 1897, c. 285, s. 25.

Powers of Judge as to taking evidence.

26. (1) Upon any appeal to a Judge under this Act, the clerk of the municipality shall have the like powers as the clerk of a Division Court as to the issuing of subpoenas to witnesses upon the application of any party to the proceedings, or upon an order of the Judge for the attendance of any person as a witness before him.

Clerk may issue subpoenas.

(2) The fees to be allowed to witnesses upon an appeal under this Act shall be upon the scale of fees allowed to witnesses in any action in the Division Court. R.S.O. 1897, c. 285, s. 26.

Witness fees.

The schedule of witness fees allowed in the Division Court is set out under section 28 (3) of The Municipal Drainage Act above.

Municipalities
to pay costs,
etc. and
collect same
from persons
liable.

27. The municipality or each of the municipalities shall within ten days after the expiration of the time for appeal or after appeal, as the case may be, pay to the engineer and Judge and all other persons entitled to the same, their charges and fees or a portion thereof awarded or adjudged to be paid by the owners therein, and shall, if the same be not forthwith repaid by the persons awarded or adjudged to pay the same, cause the amount, with seven per cent. added thereto, to be placed upon the collector's roll as a charge against the lands of the person so in default, and the same shall thereupon become a charge upon such lands, and shall be collected in the same manner as municipal taxes. R.S.O. 1897, c. 285, s. 27.

"A charge upon the lands of the person so in default."

See notes to section 30 below.

Letting work
on non-com-
pliance with
award.

28. (1) The engineer at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, and if he finds the ditch or any part thereof not completed in accordance with the award, he may let the work and supply of material to the lowest bidder giving security in favour of the municipality by which he was appointed, and approved by the engineer, for the due performance thereof within a limited time, but no such letting shall take place:—

- (a) Until notice in writing of the intended letting has been posted up, in at least three conspicuous places in the neighborhood of the place at which the work is to be done, for four clear days.
- (b) And until after four days from the sending of the notice by registered letter, to the last-known address of such persons interested in the said award as do not reside in said municipality or municipalities, as the case may be. R.S.O. 1897, c. 285, s. 28 (1); 2 Edw. VII., c. 12, s. 26.

(2) If however, the engineer is satisfied of the good faith of the person failing in the performance of the award, and there is good reason for the non-performance thereof, he may, in his discretion, and upon payment of his fees and charges, extend the time for performance.

Extension of time for compliance.

(3) Any owner in default, supplying the material and doing the work after proceedings are begun to let the same, shall be liable for the fees and expenses occasioned by his default, and the same shall form a charge on his land, and if not paid by him on notice, the council shall pay the same on the certificate of the engineer, and shall cause the amount with seven per cent added thereto to be placed on the collector's roll against the lands of the person in default to be collected in the same manner as municipal taxes.

Liability of person in default of doing work after proceedings begun.

(4) The engineer may let the work and supply of material or any part thereof, by the award directed, a second time or oftener, if it becomes necessary in order to secure its performance and completion. R.S.O. 1897, c. 285, s. 28 (2)-(4).

Power to re-let.

The only remedy open to an owner, party to the award, whose cause of complaint is that the work or a portion of it has not been completed in accordance with the award, is to have an inspection made by the engineer and the unfinished work let to the lowest bidder in the manner provided for by this section. (*Hepburn v. Tp. of Orford* (1890) 19 O.R. 585.) The Act expressly prohibits relief by mandamus. (sec. 38.)

The remedy here afforded may be taken advantage of by a subsequent purchaser whose predecessor in title was a party to the award. (*Dalton v. Tp. of Ashfield* (1899) 26 A.R. 363.)

TIME OF INSPECTION.—The section now enacts that "the engineer at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same." As it stood in the Revised Statute the engineer was obliged to make an inspection only "if required in writing so to do by any of the owners interested." This limiting clause was struck out in 1902 (2 Edw. VII. Ch. 12 sec. 26) so that the duty to inspect is now obligatory in all cases and without notification. In 1899 this section was amended (62 Vic. (2) Ch. 28 sec. 3) by adding after the word "ditch" in the second line, the words "or at any time not later than six months after the time fixed for the completion of the ditch;" but this phrase was struck out again in 1902. In *Rose v. Village of Morrisburg* (1896) 28 O.R. 245, it was urged that the statute did not sanction an inspection at any time but immediately after the time fixed for the completion of the work. Boyd C. answered this objection by saying (p. 248): "The lapse of a year or even two years (i.e. before bringing on the engineer to

inspect the work) I do not consider fatal if it is plainly made to appear that the drain was not made within the time or after the time of the proper dimensions by the one who had the first option to do the work."

INSPECTION CAN BE ENFORCED. In delivering the judgment of a Divisional Court in *O'Byrne v. Campbell* (1888) 15 O.R. 339, Armour C.J. said: "The provision of that section as to inspection by the engineer is no doubt imperative, the other provisions of that section are merely permissive, and I do not understand that any action will lie for the non-performance of duties which are merely permissive." A mandamus may be obtained to compel an engineer to perform his duties under the Act. (*Dagenais v. Town of Trenton* (1893) 24 O.R. 343.)

"He may let the work."

The duties of the engineer in this regard are summarized by Meredith C.J. in delivering the judgment of a Divisional Court in *Wicke v. Tp. of Ellice* (1906) 11 O.L.R. 422, at p. 425, as follows: "If a property owner fails to construct the portion of the drain allotted to him within the prescribed time, it is provided that the engineer may, after certain preliminary steps have been taken, let the work, and when it is finally completed the duty is cast upon him of certifying to its completion, the cost of it, the amount which the person who has done the work is entitled to be paid, and as to the person liable to pay that amount."

THE CONTRACTOR SHOULD GIVE SECURITY.—The Act does not require that any particular form of security shall be furnished. It would appear, therefore, that if the security were furnished in any of the following forms, by written guarantee from a sufficient guarantor, by a money bond from parties who could justify in the required amount, or of a deposit of a sufficient sum of money in the hands of the municipal treasurer, the Act would be complied with.

If a bond is accepted as security the following form will answer.

KNOW ALL MEN by these presents that we, A.B., of and C.D. of and E.F. of are held and firmly bound unto the corporation of the of in the penal sum of dollars of lawful money of Canada to be paid to the said Corporation or its successors or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated at the of this day of 190...

Whereas the said A.B. has entered into an agreement in writing with the said Corporation to construct (that portion of) a certain award ditch authorized by the award of the engineer of the said corporation dated the day of 190..., which lies between lot number in the concession of the said (township) and lot number in the concession of the said township, for the price or sum of dollars, and to supply all necessary labor and material therefor, and to fully complete the same according to the plans and specifications of the said engineer and under his supervision, and to obtain the said engineer's certificate that he has completed the same.

Now therefore the condition of this obligation is such that if the said A.B. shall furnish and pay for all necessary labor, tools, materials and things, and shall undertake and complete that part of the said award ditch above described, not later than the day of 190 , in accordance with the plans and specifications and award of the said engineer, and under his directions and supervision, and shall obtain his certificate of having completed the said work as provided by section 29 of The Ditches and Water-courses Act, and shall do and perform all other agreements and things by him to be done and performed under a certain agreement of letting between him and the said Corporation, and shall in addition indemnify and save harmless the said Corporation of and from all loss, costs, charges, liens, damages and expenses in connection therewith, and of and from all verdicts, damages, and costs recovered against the said Corporation by reason of the negligence, default or misconduct of the said A.B., or of his workmen, employees or agents in or about the said work; and shall also indemnify and save harmless the said Corporation of and from all loss, costs, damages and expenses arising upon any reletting of the said work or of any part thereof rendered necessary by the failure of the said A.B. to complete the same, then this obligation shall be void, but otherwise shall be and remain in full force and effect.

Signed, sealed and delivered, etc. }

Approved. }

X. Y., Engineer.

"Notice by registered letter."

An earlier statute provided that a demand in writing should be served on the party primarily liable to do the work before it could be let to another. In *Murray v. Dawson* (1867) 17 U.C.C.P. 588 the Court of Common Pleas was called upon to consider whether a plaintiff could recover damages from the defendant because of the latter's failure to open her share of an award ditch. The declaration did not show that a demand in writing had been made upon her to perform her share of the award. It was held that the plaintiff could not succeed, that the remedy provided by the Act was exclusive and the only one open to him.

In a later case, *re Roberts & Holland* (1871) 5 P.R. 346, it appeared that no written demand had been served upon the defaulting owner, but that he knew the work for which he was liable was being done by others. Under these circumstances, Wilson J. said (p. 355): "I do not think I should, if I were quite certain of possessing the power, stop all proceedings because the demand had not been made in writing, or if even no demand at all had been made on Patrick Holland to do the work, when it appeared he saw it done, and gave directions for the doing of it, without any objection at the time."

"The engineer may extend the time for performance."

The object of this provision might well be defined by adopting with slight alterations the remarks of Moss C.J.O. (*re McKenna & Tp. of Osgoode* (1906) 13 O.L.R. 472) in considering the effect of an analogous clause of The Municipal Drainage Act. "It is a limited power to extend for good cause. Its exercise is dependent upon inability of the landowner owing to the nature of the work to complete it at an earlier date and not upon dilatoriness or supineness on his part."

"The same shall form a charge on his land."

See *Wicke v. Tp. of Ellice* (1906) 11 O.L.R. 422, cited below under sec. 30, and *Beatty v. Purden* (1895) 13 Ind. App. 507.

"Shall cause the amount to be placed on the collector's roll."

It has been held by a Divisional Court in *Rose v. Village of Morrisburg* (1896) 28 O.R. 245, pp. 250, 252, that placing the amount certified by the engineer against the lands of the defaulting owner is a ministerial act, and may be delegated by the council to the Reeve. It is not necessary that a by-law or resolution of council should be passed authorizing the entry.

"The engineer may let the work.....a second time or oftener, if necessary."

In *Cuddahee v. Tp. of Mara* (1906) 12 O.L.R. 522 it was held by a Divisional Court, that where the work in default had been let to the lowest bidder, and he has failed to complete it, the engineer has full power under this subsection to relet the work, and that the municipality is under no obligation to first sue for damages for breach of contract.

"The fees and expenses."

The engineer's certificate of the amount due him for fees and expenses is prima facie evidence of the amount due, and the onus is on the plaintiff to show that it is incorrect. (*Cuddahee v. Tp. of Mara* (1906) 12 O.L.R. 522.)

Certificates of
engineer upon
completion of
work let.

29. The engineer shall, within ten days after receipt of notice in writing of the supplying of material and completion of the work let, as in the next preceding section mentioned, inspect the same, and shall if he find the material furnished and the work completed, certify the same in writing, (Form H,) stating the name of the contractor, the amount payable to him, the fees and charges which the engineer is entitled to for his services rendered necessary by reason of the non-performance, and by whom the same are to be paid. R.S.O. 1897, c. 285, s. 29.

FORM H.

(Section 29.)

CERTIFICATE OF ENGINEER.

To

Clerk of the

of

I hereby certify that _____ has furnished the material and completed the work (as the case may be) which under my award made in accordance with the provisions of *The Ditches and Watercourses Act*, and dated the _____ day of _____ A.D. 190____, one _____ owner of lot number (describe his land giving township or otherwise) was adjudged to perform, and having failed in the performance of the same it was subsequently let by me to the said _____ for the sum of \$ _____, and as he has now completed the performance thereof he is entitled to be paid the said amount.

I further certify that my fees and charges for my services rendered necessary by reason of such failure to perform are (give items) \$ and said amount payable to the said contractor and the said fees and charges are chargeable on (describe property to be charged there-with) under the provisions of *The Ditches and Watercourses Act*, unless forthwith paid.

Dated this day of A. B., 189 .
(Signature of Engineer.)
Engineer for

R.S.O. 1897, c. 285, Sched. Form H.

It has been held in a case which arose under a Drainage Act of the State of Indiana (*State v. Bever* (1895) 143 Ind. 488) that mandamus would lie to compel a surveyor appointed to supervise the construction of a public ditch to inspect the work, when notified by the contractor that it was completed, and to compel the issuance of a certificate, if on such inspection it appears that it has been completed in accordance with the specifications and within the time limited for the performance of the work. This is in agreement with the decision of a Divisional Court upon an analogous point. (*Dagenais v. Town of Trenton* (1893) 24 O.R. 343.)

30. The Council shall at their meeting next after the filing of the certificate or certificates as in the next preceding section mentioned, pay the sums therein set forth to the persons therein named, and unless the owners within the municipality upon notice pay the sums for which they are thereby made liable, the Council shall have power to cause the amount each owner is liable for, together with seven per cent. added thereto, to be placed upon the collector's roll, and the same shall thereupon become a charge against his lands, and shall be collected in the same manner as municipal taxes. R.S.O. 1897, c. 285, s. 30.

Payment of amounts named in certificates of engineer.

"To be placed on the collector's roll."

See *Rose v. Village of Morrisburg* (1896) 28 O.R. 245, cited above under section 28.

"Shall thereupon become a charge against his lands."

It has been held by a Divisional Court in *Wicke v. Tp. of Ellice* (1906) 11 O.L.R. 422 that the amount placed upon the collector's roll against the lands of a defaulting owner as provided by this section becomes a charge upon the lands binding upon a successor in title. A similar construction has been adopted in interpreting an analogous provision of an Indiana Drainage Act. (*Beatty v. Purden* (1895) 13 Ind. App. 507, at p. 512.)

31. (1) If it appears to the engineer that rock-cutting or blasting is required, the engineer may cause the work of cutting or blasting and removing

Letting contracts for rock-cutting or blasting.

the rock to be done by letting the same out to public competition by tender or otherwise, instead of requiring each owner benefited to do his share of the work; and the engineer shall, by his award, determine the fractional part of the whole cost which shall be paid by each of the owners benefited, and upon completion of the rock-cutting or blasting and removal, shall certify to the clerk of the municipality by which he was appointed, the total cost thereof including his fees and charges, and the said clerk, and the clerk of any other municipality affected shall notify all the owners liable to contribute under the award, within their respective municipalities of the said total cost and the part to be paid by him, and unless forthwith paid, the same with seven per cent. added thereto, shall be placed on the collector's roll of the municipality in which his lands are situate, and the same shall thereupon become a charge against the land of the owners so liable, and shall be collected in the same manner as municipal taxes.

Payment of
contractor
and engineer.

(2) It shall be the duty of the municipality in which proceedings for the work were commenced, through the treasurer thereof, to pay the contractor for the rock-cutting or blasting and removal as soon as done to the satisfaction and upon the certificates of the engineer, and also to pay the fees and charges of the engineer in connection therewith. R.S.O. 1897, c. 285, s. 31.

"His fees and charges."

See *Cuddahee v. Tp. of Mara* (1906) 12 O.L.R. 522 cited above under sec. 28.

"The same shall become a charge against the land."

See cases cited under section 30 above.

"Upon the certificates of the engineer."

See notes to section 29 above.

Owners desir-
ing to avail
themselves of
ditch after
construction.

32. In case any owner during or after the construction of a ditch desires to avail himself of such ditch for the purpose of draining other lands than those contemplated by the original proceedings he may avail himself of the provisions of this Act, as if

he were an owner requiring the construction of a ditch; but no owner shall make use of a ditch after construction, unless under an agreement or award, pursuant to the provisions of this Act. R.S.O. 1897, c. 285, s. 32.

33. This Act shall apply to the deepening, widening or covering of any ditch already or hereafter constructed, and the proceedings to be taken for procuring such deepening, widening or covering, shall be the same as the proceedings to be taken for the construction of a ditch under the provisions of this Act, but in no case shall a ditch be covered, unless when covered it will provide capacity for all the surface and other water from lands and roads draining naturally towards and into it as well as for the water from all the lands made liable for the construction thereof. R.S.O. 1897, c. 285, s. 33.

deepening,
widening or
covering
ditch.

Cf. section 11 of the Municipal Act, by which it is provided that a natural watercourse shall not be made into a covered drainage work unless it provides capacity for all surface water naturally draining towards it as well as for the water from the lands made liable for the construction thereof. Why it should be enacted that lands naturally draining in a certain direction should have a right to use a covered ditch wholly of artificial construction, without contributing to its cost, is not so apparent.

34. The maintenance of any ditch, whether covered or open, constructed, or of any creek or watercourse that has been deepened or widened, under the provisions of any former Act respecting Ditches and Watercourses, or constructed, deepened, widened or covered under this Act, shall be performed by the respective owners, in such proportion as is provided in the original or any subsequent award; and the manner of enforcing the same, shall be as hereinafter provided. R.S.O. 1897, c. 285, s. 34.

Maintenance
of ditches
heretofore or
hereafter con-
structed.
Rev. Stat.,
1877, c. 199;
46 V. c. 27;
Rev. Stat.,
1887, c. 220;
57 V. c. 55.

35. (1) If any owner whose duty it is to maintain any portion of a ditch, neglects to maintain the same in the manner provided by the award, any of the owners parties to the award whose lands are affected by the ditch, may, in writing, notify the owner making default, to have his portion put in repair within thirty days from the receipt of such notice; and if the repairs

Enforcing
maintenance.

are not made and completed within thirty days, the owner giving the notice may notify the engineer, in writing, to inspect the portion complained of.

(2) The inspection by the engineer and the proceedings for doing and completing the repairs required and enforcing payment of costs, fees and charges shall be as hereinbefore provided in case of non-completion of the construction of a ditch; but should the engineer find no cause of complaint he shall certify the same with the amount of his fees and charges to the owner who complained and also to the clerk of the municipality, and the owner who made complaint shall pay the fees and charges of the engineer, and if not forthwith paid by him, the same shall be charged and collected in the same manner as is provided for by this Act, in the case of other certificates of the engineer.

(3) Any owner interested in or affected by any ditch heretofore or hereafter constructed, which has not been constructed under any of the Acts mentioned in section 34 of this Act, nor under this Act, nor under any Act relating to the construction of drainage work by local assessment, may take proceedings for the deepening, widening, extending, covering or repair of such ditch in the same manner as for the construction of a ditch under this Act; provided always that the extent of the work and costs thereof and assessment therefor shall not exceed the limitations imposed by sections 5 and 6 of this Act. R.S.O. 1897, c. 285, s. 35.

"The owners parties to the award."

Owner means the owner for the time being. A successor in title stands in the place of his predecessor who was a party to the award, and may take the necessary proceedings to enforce the maintenance of the ditch. (*Dalton v. Tp. of Ashfield* (1889) 26 A.R. 363, at p. 380; *Wicke v. Tp. of Ellice* (1906) 11 O.L.R. 422, at p. 426.)

ENFORCING MAINTENANCE.—An action will not lie to compel a defaulting owner to maintain his portion of a ditch. The only remedy available to any interested owner is to enforce the terms of the award in the manner outlined by this section. In *Murray v. Dawson* (1867) 17 U.C.C.P. 588, at p. 592, it was said by Wilson J. in this connection: "The intention of the Legislature was in my opinion to place in the hands of either party interested the right to specific performance of the relief sought, but not damages by suit

for non-performance of it." This statement was cited with approval, at a subsequent date, by Moss C.J.O. in delivering the judgment of the Court of Appeal in *Dalton v. T.p. of Ashfield* (1898) 26 A.R. 363, at p. 381. See also *re McLellan & T.p. of Ching-nacousy* (1900) 27 A.R. 355, at p. 363.

In *Dalton v. T.p. of Ashfield* (1898) 26 A.R. 363 at p. 367, Ferguson J., whose judgment was subsequently affirmed by the Court of Appeal, said: "The action is, I think, an action against the defendants substantially for alleged non-repair or improper maintenance of the cedar culvert, the plaintiff claiming damages which he said resulted to him. In my view of the case it seems to fall plainly under the provisions of sections 34 and 35 and I think the remedy there given and pointed out is an exclusive one. The remedy would, as I think, be exclusive and the only one even if the words of the sections were not as plain as they are." See also cases cited under section 38 below.

Neither can the municipality be compelled to make the necessary repairs. *Quick v. Parratt* (1906) 167 Ind. 31.

"May notify."

The required notice must be served on the defaulting owner before the moving owner is authorized to bring on the engineer. (*Murray v. Dawson* (1867) 17 U.C.C.P. 588.) Unless he should be personally present and have full knowledge of the proceedings and make no objection during the progress of the work, as in such a case he would be estopped from taking advantage of the lack of a written notice. (*re Roberts & Holland* (1871) 5 P.R. 346, at p. 355.)

EFFECT OF PROCEEDING BY MISTAKE UNDER SECTION 28 INSTEAD OF UNDER THIS SECTION.—In *Lamphier v. Stafford* (1902) 1 O.W.R. 329, the facts were as follows. After the ditch had been finished in pursuance of the award, the plaintiff filled up that part of it which crossed his land. Proceedings were thereupon taken under section 28 and under their authority the defendant entered upon the plaintiff's land and cleaned out the ditch. The plaintiff brought action for damages for trespass and was awarded nominal damages and costs. On appeal to a Divisional Court this judgment was affirmed on the ground that as the work directed by the award had been completed, if relief was sought it should have been obtained by proceeding under this section to enforce the plaintiff's duty to maintain the ditch, and in the absence of such proceedings the entry was unauthorized and illegal. See also upon this point *Freed v. Stuart* (1907) 147 Mich. 31. In this case the Court found that the defendant had committed a trespass in cleaning out a drain by exceeding the authority conferred upon him by the Statute.

But a party upon whom the obligation to maintain a portion of a ditch has been imposed by the award may enter upon the land of another, when it is necessary for him to do so in order to carry out his duty in that respect, and does not thereby become a trespasser. (*Kelly v. O'Grady* (1873) 34 U.C.Q.B. 562.)

36. Any owner party to the award whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and watercourses, may, at any time after the expiration

Reconsideration of agreement or award

of two years from the completion of the construction thereof, or in case of a covered drain at any time after the expiration of one year, take proceedings for the reconsideration of the agreement or award under which it was constructed, and in every such case he shall take the same proceedings, and in the same form and manner, as are hereinbefore provided in the case of the construction of a ditch.

Provided

Provided that in case any ditch, after its construction, proves insufficient for the purposes for which it was constructed so as to cause an overflow of water upon any lands along the said ditch and causes damage to the same, any owner party to the award may at any time after the expiration of six months from the completion of the ditch take proceedings as aforesaid for the reconsideration of the agreement or award under which such ditch was constructed for the purpose of remedying the defect in that particular respect. R. S. O. 1897, c. 285, s. 36: 8 Edw. VII. c. 64, s. 2.

RECONSIDERATION OF THE AGREEMENT OR AWARD.—In the recent case of *Cuddahee v. Tp. of Mara* (1906) 12 O.L.R. 522, at p. 524, Mulock C.J. said, in delivering the judgment of a Divisional Court: "We are of opinion that by virtue of this section the engineer, on the reconsideration of an award, may make whatever award might have been made in the first instance." In *Tp. of Logan v. Tp. of McKillop* (1898) 25 A.R. 498, however, several of the judges of the Court of Appeal were of opinion that this section was not intended to be made use of to procure the widening or deepening of a ditch already constructed. MacLennan J.A. said (p. 512): "I do not think section 36 has any application to a case like the present of deepening and widening a ditch already constructed. This is provided for by section 33 in respect of which there is no limit of time imposed. Section 36 is for the reconsideration of the agreement or award, but says nothing about new work. It deals with a completed work, and all that would be left for reconsideration after two years from completion would be its maintenance, as to which, upon consideration, a new agreement or a new award might then be made." And see judgment of Moss J.A. at p. 519 to the same effect.

BRINGING AN UNSATISFACTORY AWARD DITCH UNDER THE PROVISIONS OF THE MUNICIPAL DRAINAGE ACT.—By section 84 of the Municipal Drainage Act it is provided that the council of any municipality, within which any ditch constructed under the Ditches and Watercourses Act is situate, may, upon a petition being presented from a majority of the owners interested in the ditch, as provided by the former Act, assume such ditch and bring it under the provisions of that Act. And it has been held by the Court of Appeal that the enlargement and extension of such a ditch may be provided for by the same by-law which authorizes

the transfer, if the proper proceedings under the Municipal Drainage Act have been taken to that end. (*Parham v. Tp. of Sandwich S.* (1906) 8 O.W.R. 925.)

37. Any engineer who wilfully neglects to make any inspection provided for by this Act for thirty days after he has received written notice to inspect, shall be liable to a fine of not less than \$5 and not more than \$10, to be recovered with costs on complaint made before a Justice of the Peace having jurisdiction in the matter; and in default of payment the same shall be recoverable by distress, and every such fine shall be paid over to the treasurer of the municipality in which the offence arose. R.S.O. 1897, c. 285; s. 37.

Penalty for
engineer fail-
ing to inspect.

In addition to the remedy here provided, mandamus will lie against an engineer to compel him to make an inspection. (*Dagenais v. Town of Trenton* (1893) 24 O.R. 343; *State v. Bever* (1895) 143 Ind. 488.)

38. No action, suit or other proceeding shall lie or be had or taken for a mandamus or other order to enforce or compel the performance of an award or completion of a ditch made under this Act, but the same shall be enforced in the manner provided for by this Act. R.S.O. 1897, c. 285, s. 38.

Actions for
mandamus,
etc., not to lie

"No action . . . shall . . . be had . . . for a mandamus . . . to enforce the performance of an award."

In *Rose v. Village of Morrisburgh* (1896) 28 O.R. 245, at p. 247, Boyd C. said in respect to this provision: "Now if the work of construction is not completed within the time fixed by the award by the person who is directed to do the work, the remedy for non-completion is not to be sought in the Courts, but the performance of the work shall be secured in the manner provided for by the Ditches and Watercourses Act." And in delivering the judgment of the Court of Appeal in *Dalton v. Tp. of Ashfield* (1898) 26 A.R. 363, at p. 381, Moss J.A. said: "Performance is to be enforced as provided by the Act, and not by action, suit or other proceedings." (See also *Murray v. Dawson* (1867) 17 U.C.C.P. 588, at p. 592 cited above under sec. 35.)

39. In carrying into effect the provisions of this Act, the forms set forth in the Schedule hereto may be used, and the same or forms to the like effect shall be deemed sufficient for the purposes mentioned in the said Schedule. R.S.O. 1897, c. 285, s. 39.

Use of forms.

(NOTE.—The forms given in the Schedule will be found inserted under the appropriate sections of the Act.)

PART THREE.
APPENDIX OF
STATUTES.



TILE, STONE AND TIMBER DRAINAGE ACT

R. S. O. 1897, Cap. 41.

An Act respecting Tile, Stone and Timber Drainage
Debentures.

SHORT TITLE, S. 1.	PROVISIONS AS TO LOANS.
BORROWING POWERS OF COUNCILS, S. 2.	SS. 12-14.
BY-LAWS, S. 3.	INSPECTOR OF DRAINAGE
DEBENTURES, SS. 4-6.	SS. 15, 16.
PROVINCIAL TREASURER TO REPORT AS TO INVESTMENT, S. 7.	SPECIAL RATES, S. 17.
APPLICATION TO BORROW FROM COUNCIL, S. 8.	OWNER MAY DISCHARGE INDEBTEDNESS, S. 18.
ISSUE OF DEBENTURES, S. 9.	RETURNS TO GOVERNOR IN COUNCIL, S. 19.
PURCHASE OF DEBENTURES, S. 10.	AMOUNT DUE TO BE REMITTED ANNUALLY TO PROVINCIAL TREASURER, S. 20.
DEBENTURES NOT TO BE QUESTIONED, S. 11.	AFFIDAVITS, S. 21.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Tile, Stone and Timber Drainage Act.*" R.S.O. 1897, c. 41, s. 1. Short title.

2. (1) The Council of every Town, Village or Township may pass by-laws from time to time, for borrowing money for the purposes hereinafter mentioned, in sums of not less than \$2,000, nor exceeding \$10,000, such money as they may consider expedient, and for issuing therefor the debentures of the Municipality in sums of \$100 each, payable within twenty years from the 1st day of August in the year in which the money is borrowed from the Municipality as is hereinafter provided, and bearing interest at the rate of five per centum per annum, and it shall not be necessary to submit the by-law to a vote of the electors of the Municipality before the passing thereof. Or Borrowing powers of Councils.

PROVISO.

(2) The entire amount of the indebtedness of the Municipality in respect of moneys so borrowed and remaining unpaid, including the amount provided for in any by-law being passed, shall not at such time exceed the sum of \$10,000; nor shall a by-law hereunder be valid unless the same is passed at a meeting of the Council especially called for the purpose of considering the same, and held not less than four weeks after a notice of the day appointed for the meeting has been published in such newspapers as the Council by resolution may direct. R.S.O. 1897, c. 41, s. 2.

Form of
by-law
Rev Stat.,
c. 223

3. The by-law may be in the Form 1 in the Schedule to this Act, and shall be promulgated as provided by *The Municipal Act*. R.S.O. 1897, c. 41, s. 3.

Issue and sale
of debentures

4. The debentures issued under the by-law may be issued and sold by the Municipality from time to time, for the purpose only of lending the same for tile, stone or timber drainage, as hereinafter provided, as the Municipal Council thereof may require money for the said purpose. R.S.O. 1897, c. 41, s. 4.

Debentures.

5. The debentures shall be made payable to the Treasurer of Ontario, or order (Form 5), and shall have coupons attached, and each of such coupons shall be for the sum of seven dollars and thirty-six cents, being as nearly as may be the sum required to meet the annual interest of the debenture and the annual sinking fund necessary for the repayment of the debentures at the expiration of twenty years. R.S.O. 1897, c. 41, s. 5.

Application
for sale of
debentures.

6. The Council of a Municipality proposing to borrow money under the provisions of this Act, may, after the expiration of one month from the final passing of the by-law deposit with the Provincial Treasurer, a copy of the by-law, with affidavits of the Head Officer and Clerk of the Municipality in the Forms 2 and 3 to this Act, and may at any time thereafter apply for the sale of the debentures authorized thereby for such sums as hereinafter provided. The applica-

tion shall be in writing and sealed with the seal of the Municipality and signed by the Head Officer thereof, and shall specify the names of the parties to whom the money is to be loaned. R.S.O. 1897, c. 41, s. 6.

7. The Treasurer shall investigate and report to the Lieutenant-Governor in Council as to the propriety of the investments proposed in such applications in the order of time in which they are deposited; and the reports shall be disposed of by the Lieutenant-Governor in Council, in the order of time in which the same are made. R.S.O. 1897, c. 41, s. 7.

Treasurer to report to Lieutenant-Governor in Council.

8. (1) Any person assessed as owner, and being the actual owner of land in the municipality, wishing to borrow money for the purpose of tile, stone or timber drainage may make application to the council of the municipality in the Form 4 to this Act.

Application for loan.

(2) No such application shall be acted upon by the council unless it is accompanied by a statutory declaration made by the applicant stating that he is the actual owner of the lands mentioned in the said application, and that the said lands are free from encumbrance, or if the said lands or any part thereof are mortgaged or otherwise encumbered, stating the amount of such mortgage or other encumbrance and the name and address of the mortgagee or encumbrancer, and where the said mortgage has been assigned the name of the assignee or present holder of such mortgage with his address.

Statutory declaration of applicant.

(3) In case it appears that there is any incumbrance upon the said lands or any part thereof the said application shall not be disposed of until two weeks after the mortgagee or other encumbrancer has been notified by registered letter sent to him by the clerk through the post office to his last known address, of such application. R.S.O. 1897, c. 41, s. 8.

Notice to encumbrancer.

9. On such application the Council may issue debentures for such amount within the sum authorized by this Act and by by-law of the Municipality, as they may deem expedient and proper, but not ex-

Issuing debentures.

ceeding the sum or sums applied for, and not exceeding seventy-five per centum of the estimated cost of such drainage. R.S.O. 1897, c. 41, s. 9.

Purchase of
debentures out
of Con. Rev.
Fund.

10. The Lieutenant-Governor in Council may from time to time, in his discretion, invest any surplus of the Consolidated Revenue Fund, not exceeding in the whole at any one time the sum of \$200,000, in the purchase of any debentures issued under by-laws deposited as aforesaid, in respect of which the Commissioner of Agriculture shall have certified to the propriety of investment. R.S.O. 1897, c. 41, s. 10.

Debentures
declared un-
questionable

11. After such investment has been made, the debentures shall not be questioned and shall be deemed to be valid to all intents and purposes. R.S.O. 1897, c. 41, s. 11.

How and to
whom loans
to be made

12. The Council shall lend the money so borrowed only for the purpose of tile, stone or timber drainage for the same term of twenty years in sums of one or more hundreds of dollars (no fractional part of \$100 to be loaned) and to persons who are assessed as owners as aforesaid; but no part of the money so borrowed shall be loaned to any member of the Council, but a person having so borrowed any sum or sums from any municipality shall not thereby and by reason thereof be disqualified from being afterwards elected a member of the Council of such Municipality. R.S.O. 1897, c. 41, s. 12.

Non-disquali-
fication of
borrowers.

Limit of
amount to be
loaned.

13. The Council shall not loan to any person borrowing money under this Act a sum which shall require the levying of a greater annual rate for all purposes, exclusive of school rates, than three cents in the dollar upon the value of the lot or parcel of land proposed to be drained, in respect of which the money is borrowed, as ascertained by the last revised Assessment Roll of the Municipality, but in no case shall more than the sum of \$1,000 be loaned to one person. R.S.O. 1897, c. 41, s. 13.

14. The Council shall consider the applications in the order they are made, and shall loan the money to the persons whose applications shall have been approved of in the same order. R.S.O. 1897, c. 41, s. 14.

Order in which loans are to be granted.

15. The Council borrowing money under this Act shall employ a competent person as Inspector of Drainage, whose services and expenses shall be charged ratably upon the works carried on under his inspection, and shall be paid by the Council out of the money borrowed. R.S.O. 1897, c. 41, s. 15.

Appointment of Inspector.

16. The Inspector shall, on the completion of any drainage works under his charge, report to the Council the number of rods of drain constructed on each lot or parcel of land, the cost per rod, and such other particulars as may be required by the Council; the report shall be entered in a book to be provided by the Council for that purpose, and the money shall not be advanced by the Council until the report of the due completion of the work has been so made. R.S.O. 1897, c. 41, s. 16.

Inspector's report.

No advance to borrowers till report made

17. The Council shall impose, by by-law (Form 7), and shall levy and collect for the term of twenty years a special annual rate of seven dollars and thirty-six cents on each \$100 loaned over and above all other rates upon the land in respect of which the money is loaned; and the rate shall be collected in the same manner as other special rates imposed under the provisions of *The Municipal Act*. R.S.O. 1897, c. 41, s. 17.

Special annual rates.

Rev. Stat., c. 223.

18. The owner of any lot or parcel of land in respect of which money had been borrowed for tile, stone or timber drainage under this Act, may at any time obtain the discharge of his indebtedness under this Act, by paying the Treasurer of the Municipality the amount borrowed, less the annual sinking fund levied and collected, with interest thereon at the rate of five per centum per annum; and upon such pay-

Owner may discharge his indebtedness.

ment being made to the said Treasurer, he shall forthwith transmit the same to the Treasurer of Ontario, who shall apply it on account of the payment of the debentures of the Municipality under this Act. R.S.O. 1897, c. 41, s. 18.

Returns to
Lieutenant-
Governor in
Council by
Municipal
Council.

19. Every Municipal Council borrowing money under this Act shall, on or before the 15th day of January in each year, make a return to the Lieutenant-Governor in Council, for the purpose of being laid before the Legislative Assembly, showing the amount of money expended in drainage, the number of rods of drain constructed, the names of the persons borrowing and the property upon which the money has been loaned, the names of the persons whose applications have been refused, the reason in each case of such refusal, during the year next preceding the date of the return. R.S.O. 1897, c. 41, s. 19.

Treasurer of
Municipality
to remit to
Treasurer of
Ontario.

20. (1) The amount payable in any year under such by-law or debentures, for principal and interest, shall be remitted by the Treasurer of the Municipality to the Treasurer of Ontario within one month after the same shall have become payable, together with interest at the rate of seven per centum per annum during the time of default in payment.

On default
Council to
collect as a
tax.

(2) In case of the continuance of such default, the Council of the Municipality shall, in the next ensuing year (or as the case may require), assess and levy on the whole ratable property within the Municipality in the same manner in which taxes are levied for the general purposes of the Municipality, a sufficient sum over and above the other valid debts of the corporation falling due within the year, to enable the Treasurer to pay over to the Treasurer of Ontario the amount in arrear together with the interest thereon at the rate of seven per centum per annum, during the time of default in payment whether the same has been previously recovered from the parties or lands chargeable therewith or not.

Arrears made
a first charge
on funds of
municipality

(3) The amount so in arrear and interest at the rate of seven per cent. shall, except as hereinafter provided, be the first charge upon all the funds, other

than sinking funds, of the Municipality, for whatever purpose or under whatever by-law they may have been raised; and no Treasurer or other officer of the Municipality shall, after default, pay any sum whatsoever, except for the ordinary current disbursements and salaries of clerks and other employees of the Municipality, or debts due to the Government of Ontario having priority by virtue of any statute, out of any fund of the Municipality in his hands, until the sum in arrear and interest shall have been paid to the Treasurer of Ontario.

(4) If any Municipal Treasurer or other officer shall pay any sum out of the funds of his Municipality, except as aforesaid, contrary to the provisions hereinafter named, he shall be liable to the Treasurer of Ontario for every sum so paid as for money received by him for the Crown, and he shall in addition thereto incur a penalty of \$500 to be recovered with full costs by any person who sues for the same in any of Her Majesty's Courts in this Province having jurisdiction, and in default of payment of the amount which the offender is condemned to pay to the Treasurer of Ontario within the period to be fixed by the Court, the offender shall be imprisoned in the common gaol of the county for the period of twelve months unless he sooner pays the amount which he has been condemned to pay and the costs.

Penalty on officers paying out funds when default made

(5) Any Mayor, Reeve or Councillor wilfully omitting to see that the foregoing provisions are carried into effect, shall also be personally and individually liable to the Treasurer of Ontario for the full amount so in arrear and interest, to be recovered with costs by the said Treasurer of Ontario, in an action as for money had and received on Her Majesty's behalf: Provided always that no assessment, levy or payment made under this section shall in any wise exonerate the persons or lands chargeable from liability to the Municipality. R.S.O. 1897, c. 41, s. 20.

Penalty on Mayor, etc., disregarding this Act.

21. Affidavits under this Act may be sworn before a Justice of the Peace, or Notary Public, or a Commissioner for taking affidavits in the High Court. R.S.O. 1897, c. 41, s. 21.

Before whom affidavits may be sworn.

SCHEDULE.

FORM I.

(Section 3.)

FORM OF BY-LAW.

A By-law to raise the sum of \$ to aid in the construction of tile, stone or timber drains.

The Municipality of , pursuant to the provisions of *The Tile, Stone or Timber Drainage Act*, enacts as follows:

1. That the Reeve (or Mayor) of the said may from time to time, subject to the provisions of this by-law, borrow on the credit of the corporation of the said Municipality such sums of money not exceeding in the whole \$, as may be decided by the said Council, and may in manner hereinafter provided, issue debentures of the said corporation in sums of \$100 each for the amount so borrowed; the said debentures to have coupons attached as provided in section 5 of the said Act.

2. That when the Council shall be of opinion that the application of any person or persons who may be assessed as owners of land in the said Municipality, to borrow money for the purpose of constructing tile, stone or timber drains should be granted in whole or in part, then the said Council may, by resolution, instruct the said Reeve (or Mayor) to issue debentures as aforesaid, and to borrow such sum of money as does not exceed the amount applied for, and may loan the same to the said applicant on the completion of the said drainage works.

3. A special annual rate shall be imposed, levied and collected over and above all other rates upon the land in respect of which the said money shall be borrowed, sufficient for the payment of the interest and sinking fund, as provided in the said Act.

R.S.O. 1897, c. 41, Form 1, *Sched.*

FORM 2.

(Section 6.)

Affidavit of Reeve or other Head Officer.

County of } I, of the
TO WIT: } of in the County of
and Province of Ontario, (Reeve) of the of make
oath and say:—

I have not been served with any notice of intention to make application to quash a certain by-law passed on the day of A.D. 18 , by the municipal council of the said of No. intituled (*give the title of by-law*), nor have I been served with any notice of intention to make application to quash any part of said by-law, nor with any notice to that or the like effect.

Sworn, etc.

R.S.O. 1897, c. 41, Form 2, *Sched.*

FORM 3.

(Section 6.)

AFFIDAVIT OF CLERK OF MUNICIPALITY.

County of } I, of of
To wit: } in the County of
and Province of Ontario, Clerk of the said of
make oath and say:—

1. On the day of A.D. 19
the Municipal Council of the said of
passed a by-law in regard to the borrowing of money to be lent for
the construction of drains, being No. and intituled (*state
title of by-law*), a true copy of which by-law duly certified by me is
now shewn to me and is marked "A."

2. A notice setting forth the object of the said by-law, and stating
that anyone intending to apply to have such by-law or any part
thereof quashed must within twenty days after the first publica-
tion thereof serve a notice in writing upon the Reeve or other head
officer of the Municipality, and upon the Clerk of the Municipality,
of his intention to make application for that purpose to the High
Court of Justice at Toronto, within two months from the final
passing of the by-law, was published on (*insert here the dates of
publication*), in the (*insert names of newspapers*), being the news-
papers in which the Council did by resolution direct the publica-
tion thereof in the Township of copies of which news-
papers containing the said notice are now shewn to me, marked
"B" and "C."

3. I have not been served with any notice of intention to make
application to quash the said by-law, nor with any notice of inten-
tion to make application to quash any part thereof nor with any
notice to that or the like effect.

Sworn, etc.

R.S.O. 1897, c. 41, Form 3, Sched.

FORM 4.

(Section 8.)

APPLICATION FOR LOAN.

To the Municipal Council of

I, A.B., owner of (*if part state what part*), lot No. in Con-
cession of the Township of (*or as the case may be*) hereby
apply for a loan of \$ to assist in the construction of rods
of drain. The proposed depth of drain is
inches, the proposed size of tile is inch (1).

(1) If the proposed drain is to be stone or timber for the words
"size of tile" substitute the words "inside size of drain."

(Signed) A. B.

R.S.O. 1897, c. 41, Form 4, Sched.

FORM 5.

(Section 5.)

FORM OF DEBENTURE.

\$100.

No.

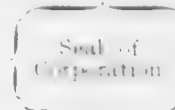
Drainage Debenture of the

of

The Corporation of the _____ of _____, in the County of _____ hereby promises to pay to the Treasurer of the Province of Ontario or order at the Bank of _____ in the City of Toronto, the sum of \$100 of lawful money of Canada, and interest thereon at five per cent. in twenty equal annual instalments of \$7.36 each, the first of such instalments to be paid on the _____ day of _____ A.D. 19____ pursuant to By-law No. _____, intituled "A By-law to raise the sum of \$____ to aid on the construction of Tile (Stone or Timber) drains."

A. B.,

Reeve



C. D.,

Treasurer.

COUPON for twentieth Annual Instalment of Drainage Debenture No. 1, issued under By-law No. _____ of the _____ of \$7.36 payable at the Bank of _____ in the City of Toronto on _____ day of _____ A.D. 19____.

A. B.,

Reeve.

C. D.,

Treasurer

COUPON for nineteenth Annual Instalment of Drainage Debenture No. 1, issued under By-law No. _____ of the _____ of \$7.36 payable at the Bank of _____ in the City of Toronto on _____ day of _____ A.D. 19____.

A. B.,

Reeve

C. D.,

Treasurer

R.S.O. 1897, c. 41, Form 5, Sched.

FORM 6.

(Section 2.)

NOTICE OF BY-LAW.

Take notice that a By-law for raising the sum of \$_____ for Drainage under the provisions of the *Tile, Stone and Timber Drainage Act* will be taken into consideration by the Municipal Council of the _____ of _____ on the _____ day of _____ A.D. 19____, at the hour of _____ o'clock in the _____ noon, at which time and place the members of the Council are hereby required to attend for the purpose aforesaid.

E. F.

Clerk.

R.S.O. 1897, c. 41, Form 6, Sched.

FORM 7

(Section 17.)

BY-LAW IMPOSING A RATE.

By-law imposing a special Drainage Rate upon Lot in the
CONCESSION.

Whereas *H. J.*, the owner of Lot in the Concession of this Township [*or as the case may be*], applied under the provisions of the *Act Respecting Tile, Stone and Timber Drainage Debentures*, for a loan to be made to him for the purpose of draining the said land; And whereas the Municipal Council has, upon the said application, loaned the said *H. J.*, the sum of \$1,000 [*or as the case may be*], to be repaid with interest by means of the rate hereinafter imposed:

Be it therefore enacted, by the said Municipal Council of the said that an annual rate of \$73.60 per annum [*or as the case may require, namely, \$7.36 for every \$100 loaned*], is hereby imposed upon the said land for a period of twenty years, such rate to be levied and collected at the same time and manner as ordinary taxes are levied and collected

R.S.O. 1897, c. 41, Form 7, Sched.

THE MUNICIPAL DRAINAGE AID ACT.

R.S.O. 1897, Cap. 40.

An Act respecting Municipal Debentures issued for
Drainage Works.

SHORT TITLE, S. 1.

TOWNSHIP UNDERTAKING DRAIN-
AGE WORKS MAY APPLY FOR
SALE OF DEBENTURES, S. 2.

COMMISSIONER OF PUBLIC WORKS
TO REPORT AS TO INVEST-
MENT, SS. 3, 4.

INVESTMENT, SS. 5, 6.

DEBENTURES NOT TO BE QUES-
TIONED AFTER INVESTMENT
MADE, S. 7.

REMITTANCE OF AMOUNT PAYABLE
ON DEBENTURES TO THE PRO-
VINCIAL TREASURER, S. 8

HER MAJESTY, by and with the advice and
consent of the Legislative Assembly of the Province
of Ontario, enacts as follows :—

Short Title.

1. This Act may be cited as "*The Municipal
Drainage Aid Act.*" R. S. O. 1897, c. 40, s. 1.

Townships
and counties
undertaking
drainage
works, may
deposit with
the Provincial
Treasurer
copies of
plans, etc.
Rev. Stat.,
c. 226.

2. (1) Every Township Municipality which has
undertaken or proposes to undertake works under the
provisions of *The Municipal Drainage Act*, or under
the provisions of any Municipal Act heretofore in force,
and every County which has issued debentures under
a by-law passed in pursuance of section 598 of *The
Consolidated Municipal Act 1892* or under *The Act
respecting certain County Drainage Works* passed in
the 58th year of Her Majesty's reign and chaptered 55,
may, after the expiration of the time limited for ser-
ving notice of intention to make application to quash
the by-law, deposit with the Provincial Treasurer
(if he deems it necessary) authenticated copies of the
plans, specifications and estimates of the works, and
a copy of the by-law; and may apply for the sale of the
debentures authorized thereby.

(2) The application shall be in writing, sealed with the seal of the Municipality, and signed by the Warden, Reeve or other head officer thereof, and shall be accompanied by two affidavits, one to be made by the said Warden, Reeve or other head officer in form or to the effect set forth in Schedule A to this Act, and the other to be made by the Clerk of the Municipality, in form or to the effect set forth in Schedule B to this Act; the affidavits may be sworn before any Justice of the Peace. R.S.O. 1897, c. 40, s. 2.

Application
for sale of
debentures.

3. The Provincial Treasurer shall investigate and report to the Lieutenant-Governor in Council as to the propriety of the investments proposed in the applications, in the order or time in which they are deposited; and the reports shall be disposed of by the Lieutenant-Governor in Council in the order of time in which the same are made. R.S.O. 1897, c. 40, s. 3.

Treasurer to
report as to
investment.

4. The Provincial Treasurer shall not certify to the propriety of the investment in any case in which the aggregate amount of the rates necessary for the payment of the current annual expenses of the Municipality and the interest and principal of the debts contracted by the Municipality exceed the aggregate value of three cents in the dollar on the whole value of the ratable property within its jurisdiction, or in any case in which the debentures to be issued under the by-law exceed \$30,000; and the amount invested under this Act in the purchase of debentures of any Municipality shall not at any one time exceed \$20,000. R.S.O. 1897, c. 40, s. 4.

When the
Treasurer not
to certify to
propriety of
investment.

5. The Lieutenant-Governor in Council may from time to time in his discretion invest any surplus of the Consolidated Revenue Fund, not exceeding in the whole at any one time the sum of \$350,000, in the purchase of debentures issued under by-laws so deposited as aforesaid, in respect of which the Treasurer certifies to the propriety of the investment. R.S.O. 1897, c. 40, s. 5.

se of
debentures

Lieutenant-Governor may advance whole or part

6. On any such investment the Lieutenant-Governor may, in his discretion, advance the whole par value of the debentures, or may retain such percentage thereof as he may see fit until the Commissioner of Public Works has reported that the works have been inspected and are completed; and the expenses in connection with the investigation and inspection made under this Act shall be deducted from the amount (if any) retained. R.S.O. 1897, c. 40, s. 6.

When debentures unquestionable

7. After such investment has been made, the debentures shall not be questioned, and shall be deemed to be valid to all intents and purposes. R.S.O. 1897, c. 40, s. 7.

Amount payable under by-law to be remitted to Provincial Treasurer

8. (1) The amount payable in any year under any such by-law or debentures for principal and interest shall be remitted by the Treasurer of the Municipality to the Treasurer of the Province, within the space of one month after the same has become exigible, together with interest at the rate of seven per centum per annum, during the time of default in payment; and in case of the continuance of such default, the Council of the Municipality shall in the next ensuing year assess and levy on the whole ratable property within its jurisdiction, in the same manner in which taxes are levied for the general purposes of the Municipality, a sufficient sum over and above the other valid debts of the Corporation falling due within the year, to enable the Treasurer of the Municipality to pay over to the Treasurer of the Province the amount in arrear, together with interest thereon at the rate of seven per centum per annum, during the time of default in payment, whether the same has been previously recovered from the parties or lands chargeable therewith under the by-law or not; and the amount so in arrear and interest shall be the first charge upon all the funds of the Municipality other than sinking funds, for whatever purpose, or under whatever by-law they may have been raised

Consequences of neglect.

(2) No Treasurer or other officer of the Municipality shall after such default, pay any sum whatsoever, except for the ordinary current disbursements, and salaries of clerks and other employees of the Municipality out of funds of the Municipality in his hands, until the amount so in arrear and interest have been paid to the Treasurer of the Province.

Duty and liability of municipal Treasurer after default.

(3) If such Treasurer or municipal officer pays any sum out of the funds of his Municipality, except as aforesaid, contrary to the provisions hereinbefore made, in addition to any criminal liability which he may thereby incur, he shall be personally liable to the Treasurer of the Province for every sum so paid, as for money received by him for the Crown; and any Reeve or Councillor wilfully or negligently omitting to see the foregoing provisions carried into effect shall also be personally and individually liable to the Treasurer of the Province for the full amount so in arrear and interest to be recovered with costs by the Treasurer of the Province, in an action as for money had and received on Her Majesty's behalf; but no assessment, levy or payment made under this section shall in anywise exonerate the persons or lands chargeable under the by-law from liability to the Municipality. R.S.O. 1897, c. 40, s. 8.

Liability of Treasurers, Reeves, and Councillors

SCHEDULE A.

(Section 2.)

AFFIDAVIT OF WARDEN, REEVE OR OTHER HEAD OFFICER.

County of _____ I,
To Wit, _____ of the _____ of
_____ in the County of _____
and Province of Ontario, Reeve of the Township of _____
make oath and say

1. That I have not been served with any notice of intention to make application to quash a certain by-law, being No. _____ passed on the _____ day of _____ in the year _____ of our Lord _____ by the Municipal Council of the said Township of _____ in regard to the drainage of a certain portion of the said Township, nor have I been served with any notice of intention to make application to quash any part of said by-law, nor with any notice to that or the like effect.

Sworn, etc.

R.S.O. 1897, c. 40, Sched. A.

SCHEDULE B.

(Section 2).

AFFIDAVIT OF THE CLERK OF THE MUNICIPALITY.

County of {
To Wit. {I, _____ of
of the _____ and
in the County of _____ and
Province of Ontario, Clerk of Township
make oath and say

1. On the _____ day of _____ in the year _____ of our Lord the Municipal Council of the said Township of _____ passed a by-law in regard to the drainage of a certain portion of the said Township, a true copy of which is now shewn to me marked "A."

2. Before the said _____ day of _____ the said by-law, together with a notice that any one intending to apply to have such by-law or any part thereof quashed, must within ten days after the passing thereof, serve a notice in writing upon the Reeve or other head officer, and upon the Clerk of the Municipality, of his intention to make application for that purpose to the High Court of Justice at Toronto, within two months from the final passing of the by-law, and together with a notice of the time of holding the Court of Revision of the said Township, was published on (insert date of publication) in the (insert name of newspaper), a newspaper published at _____ in the Township of _____ (state facts with reference to publication shewing that the provisions of the Municipal Act have been complied with.) a copy of which newspaper containing the said by-law and notice is now shewn to me and marked "B".

3. I have not been served with any notice of intention to make application to quash said by-law, nor with any notice of intention to make application to quash any part thereof, nor with any notice to that or the like effect.

4. To the best of my knowledge, information and belief, no person assessed by the said by-law paid the amount of his assessment less the interest, or any part thereof, at any time before the actual issue of the Debentures thereunder, which were issued on the _____ day of _____ in the year of our Lord _____.

5. The amount of the rates assessed as set forth in said by-law have not been altered by the Court of Revision of the said Township of _____ nor by the County Judge, nor has the said by-law been repealed or amended by the said Council of the said Township of _____ but the said by-law is to all intents and purposes the same, and as valid and subsisting as it was when finally passed on the said _____ day of _____ in the year of our Lord (or otherwise according to the fact).

6. The Copies of the specifications and estimates of the said drainage now shewn to me and marked _____ are true and authentic copies of the specifications and estimates made by _____ for the said drainage, as mentioned in the said by-law.

Sworn, etc.

R.S.O. 1897, c. 40, Sched. B.

THE PROVINCIAL DRAINAGE AID ACT.

(63 Vict., Cap. 8).

Assented to 30th April, 1900.

WHEREAS the Legislature of the Province of Preamble.

Ontario has from time to time passed various Acts for the purpose of enabling municipalities to provide drainage works by local assessment for the removal of surface water from wet, marsh and low-lying lands, and discharging such waters through such drainage works by gravitation, pumping or other mechanical means into natural outlets in lakes, rivers and streams; and whereas many municipalities have taken advantage of the said Acts and by so doing have rendered the lands in such localities much more productive and valuable, but in some cases the main channel for the conveying and discharging the water is a natural stream, creek or watercourse, either in its natural condition or as artificially improved, or is wholly artificial, or throughout the course of the drainage work high lands exist, so that the cuttings of the work, together with the length or extent of the work, are of such a magnitude as to render the cost of the construction, reconstruction or maintenance of the drainage scheme too great a burden upon the owners of the lands assessed therefor: and whereas in consequence of the want of carrying capacity for the waters and the defective nature of the outlets reached, lands are insufficiently drained, damages are caused by overflow and litigation has been resorted to, to compel municipalities to provide sufficient capacity for the conveyance and discharge of the waters into such an outlet as will cause no damage to adjoining lands; and whereas the sum of ten million dollars more or less has been expended in the construction and maintenance of such drainage schemes, and

large sums of money, in addition to private expenditure, have been loaned under the authority of the Legislature of the Province of Ontario for the construction of tile or under drainage, and as the best results have not and cannot be realized from such expenditure without providing an effective main channel for the removal and safe discharge of all waters conveyed by such under drainage and the branches or laterals of the main channel, it is expedient that the Legislature in the public interest should grant such aid as will assist in improving and perfecting the principal outlet for such water; and whereas on account of the great expense of providing the main channel with sufficient depth, and with sufficient capacity to produce the best results from under drains, award drains and drainage works constructed by by-laws, many municipalities have been wholly unable to undertake and carry out, at the expense of the lands interested, such works as will perfect the whole drainage system within the watershed, and thus render it most effective in the drainage of the lands and in the cultivation and value thereof; and whereas numerous large tracts of submerged lands have been reclaimed by embanking and pumping and other mechanical means to the great advantage of the Province, although in some cases the results of the work undertaken for such purposes are not satisfactory because of insufficient outlet; and whereas the intention of this Act is not in any way to interfere with any of the provisions of *The Municipal Drainage Act* or of any other Acts relating to the removal of surface water, but on the contrary to supplement the provisions of the said Act so as to encourage and assist the construction and reconstruction of the main channels and pumping or artificial outlets in cases where the levying of the costs required to provide the same would be greater than the lands interested therein or affected thereby can be reasonably expected to bear.

Therefore Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act shall apply to that portion of the trunk channel constituting the outlet of any drainage work as defined by *The Municipal Drainage Act* and of any drainage works now constructed or hereafter to be constructed for effecting drainage by embanking, pumping or other mechanical means.

Application of Act

2. The provisions of this Act shall be applicable to the construction or reconstruction of any drainage work mentioned in the next preceding section hereof.

Act to extend to reconstruction of work.

3. The council of the municipality initiating the construction or reconstruction of any drainage work as above described shall be the applicant for aid to the Lieutenant-Governor of the Province of Ontario in any case where assistance is sought.

Council of initiating municipality to apply for aid.

4. The application shall be by way of petition and shall set forth the engineer's report on the proposed work after adoption by the council initiating the work, the assessments upon the lands interested therein or affected thereby and the cash value of the lands so assessed and in parcels as described by the engineer in making his assessment, and such petition shall be verified by the statutory declaration of the engineer employed by such municipality to make the report, and a field plan of the proposed work shall be furnished with the petition.

Form of application.

5. Should the said report and field plan show that the proposed work is being undertaken for any of the following purposes: (a) To provide and improve that portion of the trunk channel constituting the outlet for the drainage work; (b) to furnish capacity over intervening high lands to a natural or other outlet; (c) to render more effective the operating of a drainage work by embanking, pumping or other mechanical means; then and in every such case the Lieutenant-Governor in Council may cause an examination of the drainage work referred to in the petition and field plan to be made by an engineer of the Public Works Department, whose duty it shall be to report fully upon the contemplated work and all matters connected therewith, and upon his report the Lieutenant Governor in

Examination and grant of aid on report thereon.

Council may assume and pay such proportion of the cost of the undertaking as may seem just and reasonable in the public interest and as may be approved by the Legislative Assembly.

Investigation
by Drainage
Referee.

6. The Lieutenant-Governor in Council may at any time direct any investigation or enquiry respecting the said drainage work and any claim for damages or compensation arising from the construction, re-construction or maintenance of the said drainage work or consequent thereon, to be made by the Referee under the Drainage Laws as may be deemed proper, who shall have and possess, in making such investigation and enquiries, all the powers conferred upon him by *The Municipal Drainage Act*.

Short Title.

7. This Act may be known and cited as *The Provincial Drainage Aid Act*.

REVISED STATUTES OF CANADA (1906)

CHAPTER 37.

An Act Respecting Railways.

Drainage

250. The company shall in constructing the railway make and maintain suitable ditches and drains along each side of, and across and under the railway, to connect with ditches, drains, drainage works and water-courses upon the lands through which the railway runs, so as to afford sufficient outlet to drain and carry off the water, and so that the then natural, artificial, or existing drainage of the said lands shall not be obstructed or impeded by the railway.

(2) Whenever:—

- (a) any lands are injuriously affected by reason of the drainage upon, along, across or under the railway being insufficient to drain and carry off the water from such lands; or, If drainage insufficient.
- (b) any municipality or landowner desires to obtain means of drainage, or the right to lay water pipes or other pipes, temporarily or permanently, through, along, upon, across or under the railway or any works or land of the company; the Board may, upon the application or complaint of the municipality or landowner, order the company to construct such drainage or lay such pipes, and may require the applicant to submit to the Board a plan and profile of the portion of the railway to be affected, or may direct an inspecting engineer, or such other person as it deems advisable to Board may order.

appoint, to inspect the locality in question, and, if expedient, there hold an enquiry as to the necessity or requirements for such drainage or pipes, and to make a full report thereon to the Board.

Terms and conditions

(3) The Board may upon such report, or in its discretion, order how, where, when, by whom, and upon what terms and conditions, such drainage may be affected, or pipes laid, constructed and maintained, having due regard to all proper interests. 3 E. VII. c. 58, s. 196.

Drainage proceedings under Provincial Acts

251. Whenever by virtue of any Act of any province through which a railway runs, proceedings may be had or taken by any municipality or landowner for any drainage or drainage works, upon and across the property of any other landowner in such province, the like proceedings may, at the option of such municipality or landowner, be had or taken by such municipality or landowner for drainage, or drainage works, upon and across the railway and lands of the company, in the place of the proceedings before the Board in the last preceding section provided.

Provincial laws to apply.

(2) In case of any such proceedings, the drainage laws of the province shall, subject to any previous order or direction of the Board made or given with respect to drainage of the same lands, apply to the lands of the company upon or across which such drainage is required, to the same extent as to the lands of any landowner in such province: Provided that the company shall have the option of constructing the portion of any drain or drainage work, required to be constructed upon, along, under or across its railway or lands.

Option of company.

of option not exercised.

(3) In the event of the company not exercising such option, and completing such work within a reasonable time, and without any unnecessary delay, such work may be constructed or completed in the same manner as any other portions of such work are provided under the laws of such province to be constructed.

Approval of Board

(4) Notwithstanding anything in this section contained, no drainage works shall be constructed or re-

constructed upon, along, under or across the railway or lands of the company until the character of such works, or the specifications or plans thereof, have been first submitted to and approved of by the Board.

(5) The proportion of the cost of the drain, or ^{Cost} drainage works, across or upon the railway, to be borne by the company, shall, in all such cases, be based upon the increase of cost of such work caused by the construction and operation of the railway. 3 E. VII. c. 58, s. 197.

INDEX TO MUNICIPAL DRAINAGE ACT.

NOTE.—For purposes of convenience and to avoid ambiguity a separate index to the Ditches and Watercourses Act has been prepared. See page 357.

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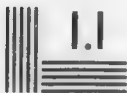


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